88-1665

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

—o—

MARIA BRUEHWILER BREWSTER,

Petitioner,

v.

MARYLAND SECURITIES COMMISSIONER,

Respondent.

—o—

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

—o—

PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law when the State of Maryland suspended her securities salesperson's license where the suspension was based on a finding that she had engaged in a "dishonest or unethical practice" prohibited by the Maryland Securities Act § 11-412(a)(7) when she sold a security to Maryland residents which the State later found to be "unsuitable" for these particular investors. The term "unsuitable" is used in the Rules of Fair Practice of the National Association of Securities Dealers, Inc., but is neither used nor defined by the Maryland Securities Act nor by rules promulgated thereunder; neither is it meaningfully defined by any body of case law. Is the statute, as applied to petitioner, void for vagueness?

2. Whether the State of Maryland violated Petitioner's first amendment rights to free speech by not permitting her to freely disseminate non-misleading information about stock to prospective customers.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR WRIT OF CERTIORARI

—o—

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Maryland Court of Appeals entered in this matter on January 11, 1989.

OPINION BELOW

The order of the Maryland Court of Appeals, denying the petition for writ of certiorari, dated January 11, 1989, is reprinted in the separate Appendix to this Petition, p. 1. The opinion of the Maryland Special Court of Appeals, dated October 6, 1988, is reported at 76 Md.App. 722, 548 A.2d 157 (1988), and is reprinted in the Appendix at pp. 2-11.

———o———

JURISDICTION

The judgment of the Maryland Special Court of Appeals was entered on October 6, 1988. The Maryland Court of Appeals denied a petition for writ of certiorari on January 11, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

———o———

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

1. United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws.

3. Maryland Securities Act, § 11-412(a)(7), Maryland Corporations and Associations Article, Title 11, Annotated Code of Maryland.

Reproduced in the Appendix at pp. 64-66.

4. National Association of Securities Dealers, Inc., Rules of Fair Practice, Article III, Section 2.

Reproduced in the Appendix at pp. 67-70.

STATEMENT OF THE CASE

On February 28, 1986, the Maryland Securities Commissioner issued an order to Petitioner, Maria Bruehwiler Brewster ("Petitioner"), to show cause why her securities salesperson's license should not be suspended for a period of 90 days, and why a fine should not be imposed for violating the Maryland Securities Act, Maryland Annotated Code, Corporations and Associations Article, § 11-412(a)(7) ("the Act") for engaging in dishonest and unethical practices for making an "unsuitable" recommendation of a stock purchase to a Maryland couple. It was alleged that Petitioner had telephoned a Maryland couple, solicited their purchase of CXR Telecom Corporation stock, a speculative stock, but during her communications had neglected to ask sufficient questions to allow her to determine whether this stock was "suitable" for

these particular investors. The show cause order also charged that Petitioner had induced the customer to exaggerate his net worth in order to facilitate the approval of the transaction by her brokerage firm.

A hearing officer considered the matter on June 30, 1986 and issued his Findings of Fact and Conclusions of Law, recommending that the Commissioner suspend Petitioner for 30 days and fine her $100 (Appendix p. 55). The Commissioner considered exceptions filed by both parties, and issued a Ruling on Exceptions on May 28, 1987, wherein she adopted the hearing officer's recommendations with one modification (Appendix pp. 17-30).

The case then proceeded on appeal to the Circuit Court for Baltimore City, which issued its Memorandum and Order on December 23, 1987, upholding the Commissioner's sanctions (Appendix pp. 12-16). The Circuit Court also held that Petitioner's commercial free speech protected by the First Amendment had not been violated.

The case next was appealed to the Maryland Court of Special Appeals which issued its opinion on October 6, 1988 (Appendix pp. 2-10). The opinion is reported at 76 Md.App. 722, 548 A.2d 157 (1988). That Court held that the statute was not constitutionally infirm, but sufficiently advised Petitioner that she was engaging in dishonest and unethical practices for making an unsuitable recommendation (Appendix pp. 9-10). The Court agreed with the Circuit Court that no violation of Petitioner's First Amendment rights had occurred.

The Maryland Court of Appeals denied the petition for writ of certiorari on January 11, 1989 on the grounds

that there had been no showing that review by certiorari was desirable and in the public interest (Appendix p. 1).

REASONS FOR GRANTING WRIT

A.

The State Of Maryland Denied Petitioner Due Process When It Suspended Her Securities Salesperson's License, Basing The Suspension On A Finding That Petitioner Had Engaged In A "Dishonest Or Unethical Practice" Under The Maryland Securities Act § 11-412(a)-(7), When She Sold A Stock To Maryland Residents Which The State Considered "Unsuitable". "Unsuitable" Is Not Defined In The Act, By Rule, Or By Case Law, Thus, The Statute, As Applied To Petitioner, Is Void For Vagueness.

The Maryland authorities found that Petitioner had violated § 11-412(a)(7) of the Maryland Securities Act, Maryland Corporations and Associations Article, Title 11, Annotated Code of Maryland ("the Act") as to both charges, namely the making of an "unsuitable" recommendation, and Petitioner's suggestion to the customer to exaggerate his net worth. Petitioner here wishes to emphasize that she is not challenging the Maryland Court's findings that her suggestion to the customer to inflate his net worth merited sanctions. This petition concerns only the sanctions meted out for recommending an "unsuitable" stock.

Maryland authorities equated this "unsuitable" recommendation with a "dishonest and unethical practice" under the Act, which reads in pertinent part as follows:

> "§ 11-412(a) *Grounds for denial, suspension, or revocation.*
>
> The Commissioner by order may . . . suspend . . . any registration if he finds that the order is in the public interest and that the registrant . . .
>
> (7) has engaged in dishonest or unethical practices."

Petitioner maintains that Maryland denied her due process when it suspended her license, for the Act gave her no warning that the making of a perfectly honest, but "unsuitable" recommendation would subject her to punishment for "dishonest or unethical practices". The Act does not define these terms, nor is such done by regulation or case law.

The Maryland Court of Special Appeals' holding that the law relating to suitability is well defined and well known, and thus should have been known to Brewster, is erroneous (Appendix pp. 7-10). The fragmentation and confusion with respect to the law interpreting the suitability doctrine is fully explored in the seminal article by Arvard E. Roach, II, *The Suitability Obligations of Brokers: Present Law and the Proposed Federal Securities Code*. 29 Hastings Law Journal 1067 (1978).

The concept of "suitability" comes from the Rules of Fair Practice of the National Association of Securities Dealers, Inc. ("NASD") (an industry organization), Article III, § 2 which reads as follows:

> "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the fact, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

The intent of this rule is to impress on brokerage houses and their agents that they must deal fairly with customers. Although this rule has been in existence since the mid-1930's, the NASD has never ventured to define "suitability". The rule encourages the gathering of information but does not prohibit particular sales. The Court of Special Appeals' finding that the NASD manual "clearly define[s]" unethical or dishonest conduct and that Brewster must be aware of industry norms is incorrect (Appendix p. 9). The NASD's Board of Governors has contented itself to issuing a short policy statement on the subject of fair dealing with customers, which is reprinted in the NASD Manual (CCH) § 2152, Appendix pp. 67-70. No "norms" exist that Brewster could have followed.

For many years, the Securities and Exchange Commission ("SEC") has been aware that the "suitability" concept needs definition for the guidance of the securities industry and the protection of the public. In 1972, the SEC issued a release, entitled "The Obligation of Underwriters, Brokers and Dealers in Distributing and Trading Securities, Particularly of New High Risk Ventures" (File No. S7-450), Releases No. 33-5275 and No. 34-9671, July 26, 1972, 37 F.R. 16011, reprinted in 17 C.F.R. 231.5275 (241. 9671). Therein, the SEC stated that there was need to promulgate rules regarding "unsuitable recommendations relating to speculative new issues of securities in connection with proceedings relating to the conduct of brokers and dealers registered under the Exchange Act".

It asked the NASD and the national stock exchanges to consider developing suitability rules applicable to their

members "giving due weight to the factors set forth in this release". The factors to be considered were:

> "1. The investment objectives, financial situation and needs of the customers as well as the customer's experience and sophistication in securities transactions; and
>
> 2. The proper documentation necessary to assure compliance with such suitability requirements, including the member's written procedures to be followed by its associated persons."

The SEC went on to say that

> "[i]f an appropriate response is not obtained from such organizations, the Commission will then consider rule making to accomplish the necessary results for the protection of investors and in the public interest."

Almost seventeen years have come and gone and neither the NASD, the stock exchanges, or the SEC have promulgated suitability rules—nor has the State of Maryland—and the confusion and uncertainty continues.

If a statute contains some sanction to compel obedience beyond mere redress to an individual for injuries received, the statute is penal, *United States v. Kordel*, 66 F.Supp. 538 (1946), *aff'd* 336 U.S. 911 (1949), *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 36 L.Ed.2d 318, 93 S.Ct. 1652 (1973). Courts have classified many particular statutes as penal, including statutes authorizing revocation or suspension of licenses. *Land Co. of Florida v. Fetty*, 15 F.2d 942 (3rd Cir. 1927); *cert. den.* 273 U.S. 764. Courts also have recognized for some time that decisions concerning licenses directly affect personal and property rights and that agencies must accord due process and make objective decisions in any contest.

Willner v. Committee on Character & Fitness, 373 U.S. 96, 10 L.Ed.2d 224, 83 S.Ct. 1175 (1963).

Vague laws offend due process because they violate the two essential values of fair warning and non-discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Laws must give persons of ordinary intelligence a reasonable opportunity to know what is prohibited so that they can steer between lawful and unlawful conduct, *id.* at 108. The Act does not give Petitioner any warning that an honest recommendation to invest in a stock is tantamount to dishonest or unethical conduct, thus punishable by the Act, if the state later subjectively considers the transaction "unsuitable". Given Maryland's approval of the sanctions, in order for Petitioner to be assured that prosecution will not result, she is limited to unsolicited sales of "blue-chip" stocks to intelligent, well-educated, sophisticated, wealthy investors—thus giving the prohibited zone wide berth.

It is an ancient rule of statutory construction that penal statutes will be strictly construed against the State. *United States v. Wiltberger*, 5 Wheat (18 U.S.) 76, 95 (1820). Strict construction assures fairness, by requiring statutes to give clear and unequivocal warning in language understandable to ordinary people so that they may avoid exposing themselves to liability. *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1920); *SEC v. Burns*, 614 F.Supp. 1360 (S.D.Cal. 1985). "[A] statute so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The canon of strict inter-

pretation has the stature of a constitutional rule under principles of due process and is not subject to abrogation by states. *United States v. Mandel,* 415 F.Supp. 997 (D. Md. 1976).

Strict construction protects individuals from arbitrary actions by officials and judges. *Carfoss v. State,* 42 Md. 403 (1875). Persons must have "fair warning" in connection with statutes applying punitive sanctions for conduct which is not *malum in se. Simpson v. Simpson,* 490 F.2d. 803 (5th Cir. 1974). The Court in *Snitkin v. United States,* 265 F. 489, 494 (7th Cir. 1920), stated the rationale of the rule thus:

> "[T]he rule that penal statutes are to be strictly construed . . . is a fundamental principle which in our judgment will never be altered. Why? Because the law-making body owes the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen may lose his life or liberty . . . The burden lies on the lawmakers and inasmuch as it is within their power, it is their duty to relieve the situation of all doubts."

Petitioner believes that the *Cohen Grocery, supra* case is in point and should have been followed by the Maryland Court. In *Cohen Grocery,* the Supreme Court was confronted with the question of whether a statute gave fair warning to persons when it required them not "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . ." or to "exact excessive prices for any necessaries." The Court found this language to be vague, indefinite and uncertain because it left "such standards to the variant views of the different courts and juries which would be called on to enforce it, and because it did not inform the defendant of the nature

and cause of the accusations against it", 255 U.S. at 87. It was also pointed out that the statute forbade no specific or definite act, 255 U.S. at 89.

In *Parker v. Levy,* 417 U.S. 733, 41 L.Ed.2d 439, 94 S.Ct. 2547 (1974), the Supreme Court discussed the "vagueness" issue at some length. In that case, an Army doctor had been convicted, among other things, for "conduct unbecoming an officer and gentleman" (10 U.S.C. § 933), and for "disorders and neglects to the prejudice of good order and discipline in the armed forces." (10 U.S.C. § 934). The officer had been convicted for refusing to train orderlies and for urging black soldiers to disobey orders regarding fighting in Vietnam.

The doctor argued that the mentioned statutes gave him no warning of what conduct to avoid. The Supreme Court agreed that the statutes indeed were vague but found that such defects were cured through a long line of precedents which gave soldiers fair warning of actions that would result in penalties, and that this, coupled with the military's obligation imposed by 10 U.S.C. § 937, which requires that soldiers be given repeated courses in what not to do, provided appellant with ample warning. In stark contrast to the *Parker* case, Petitioner had no warning. There are no cases which hold that an "unsuitable", non-fraudulent recommendation of a security is tantamount to a "dishonest and unethical practice". None.

Federal courts have considered "suitability", but *only* in the context of fraud, *Parsons v. Hornblower & Weeks Hemphill Noyes*, 447 F.Supp. 482, 494 (M.D.N.C. 1977) and cases cited therein. In those cases it was held that fraud *per se* made trades unsuitable. In *Todd & Co.*,

Inc. v. SEC, 557 F.2d 1008 (3rd Cir. 1977), petitioner challenged NASD rules (not, however, the "suitability" rule) as void for vagueness. The court opined that maybe the rules were vague, but petitioner could not take comfort in that because its actions, selling securities at arbitrary prices and without disclosing that it was the market maker, were patent violations which made vagueness a non-issue. In contrast, Petitioner did not commit fraud, nor was she guilty of any other patent violations of the rule.

Without requirement for reasonably specific standards, securities salesmen are left open to arbitrary and capricious prosecution, and the government is given the means to effectively dictate what securities will be sold and to whom, based on its ability to intimidate broker/dealers through the use of a nebulous and shifting definition of "suitability". Such amounts to *de facto* "merit" regulation of securities offerings in the absence of legislative authority therefor.

In addition, it can hardly be said that it is in the "public interest" to punish a licensee for conduct not known or knowable to be illegal before the fact since a willfulness element is thereby lacking.

Unless and until the State of Maryland adequately defines or adopts somebody's definition of what is an "unsuitable" recommendation for a stock broker to make, and what will qualify as unethical or dishonest practice, it has no right to suspend or revoke a license under its securities laws on the grounds that any recommendation, particularly one as subject to debate as the one here, is "unsuitable". Although Maryland refused to recognize such a duty, constitutional law protects persons from pun-

ishment by the government on an arbitrary and standardless basis. Maryland erred in failing to recognize the merits of Petitioner's due process argument.

B.

The State Of Maryland Has Violated Appellant's First Amendment Rights By Not Permitting Her To Freely Disseminate Non-Misleading Information About Stock To Prospective Customers.

The Maryland Court of Appeals entirely misapprehended the issue when it held Petitioner not entitled to commercial free speech protection.

The First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech, namely, expressions related to the economic interest of the speaker and the speaker's audience, from unwarranted governmental regulation. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 65 L.Ed. 2d 341, 100 S.Ct. 2343 (1980). The free flow of commercial information is indispensable to an informed public, *Virginia Pharmacy Board v. Virginia Consumer Counsel,* 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976), and while a state can regulate the time, place and manner of conveying commercial speech, it cannot regulate its contents, unless the contents are false and misleading. *Quinn v. Aetna Life and Casualty Co.,* 409 N.Y.S.2d 473 (1978); *Hawley v. Cuomo,* 396 N.Y.S.2d 987 (1977); *Friedson v. Westport,* 435 A.2d 17 (Conn. 1980). Advertising, however tasteless and excessive it may seem, is nonetheless dissemination of information as to who is producing what product, for what reason, and at what price. So long as the speech, in whatever form of expression, disseminates

information of a commercial nature, it is commercial speech protected by the First Amendment. *State v. Bloss,* 637 P.2d 1117 (Hawaii 1981).

Here, the State cited Petitioner for making an unsuitable recommendation, *not for disseminating misleading information about CXR stock* (and there was nothing misleading in Petitioner's statement *about the security*). It imposed sanctions for this unsuitable recommendation and for suggesting to the Langs to exaggerate their net worth.

The Maryland Court of Special Appeals misapprehended the issue by so finding. The point is that Petitioner did *not* misstate anything about the stock itself, thus her advertising pitch to willing listeners is constitutionally protected by the First Amendment and it was error on the part of Maryland not to give the First Amendment effect.

Petitioner respectfully requests that this Court grant her petition for a Writ of Certiorari for the reasons stated.

DATED this 10th day of April, 1989.

Respectfully submitted,

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APPENDIX

MARIA BRUEHWILER BREWSTER	)	In the Court of Appeals of Maryland
	)	Petition Docket No. 404 September Term, 1988
v.	)	(No. 102, September Term, 1988 Court of Special Appeals)
MARYLAND SECURITIES COMMISSIONER	)	

ORDER

Upon consideration of the petition for a writ of certiorari and supplement to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and supplement be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: January 11, 1989

REPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 102

September Term, 1988

MARIA BRUEHWILER BREWSTER

v.

MARYLAND SECURITIES COMMISSIONER

Gilbert, C.J.
Moylan,
Bell, Robert M.,
JJ.

OPINION BY GILBERT, C.J.

Filed: October 6, 1988

Is the phrase "dishonest and unethical practices" that is embodied in Md. Ann. Code, Corps. and Ass'ns Article § 11-412(a)(7) vague, indefinite, ambiguous and uncertain? Does it violate the Due Process Clause of the Fifth and Fourteenth Amendments, bearing in mind that there is no litmus paper test nor "table of weights and measures for ascertaining what constitutes due process"[1] of law? That

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[1]Justice Felix Frankfurter in Burns v. Wilson, 346 U.S. 137, 149, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).

is the principal issue put to us by Maria Bruehwiler Brewster, a securities salesperson whose license was suspended for thirty days by the Maryland Securities Commission. Additionally, the Commissioner imposed a $100 fine on Brewster. The Circuit Court for Baltimore City (Friedman, J.) affirmed, and this appeal ensued.

The Facts

We set forth the facts in order to understand why the Commissioner imposed sanctions on Brewster and, concomitantly, why Judge Friedman affirmed the Commissioner.

The genesis of this case was a telephone call from Brewster to Douglas Lang. Brewster solicited Lang's purchase of CXR Telecom stock (CXR). The record shows that, while advocating CXR to Lang, Brewster failed to indicate "any specific or detailed information . . . about the particular risk factors associated with CXR."[2] The record further clearly demonstrates that, because of Lang's then relatively minuscule financial net worth, Brewster induced him to inflate five fold his net worth in order to facilitate the approval of the trade by Stuart-James, Brewster's employer.

From the record we also learn that after Lang agreed to purchase $1500 worth of CXR stock, Brewster mailed him a prospectus which spelled out the high risk factors involved. Lang obviously had a change of mind and sought to cancel the transaction. Brewster informed Lang that

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[2]Hearing officer's findings of fact, which are undisputed.

the verbal contract was binding and that, if Lang reneged, Brewster's employer would sue Lang for the money. Apparently alarmed by that information, Lang contacted the Office of the Attorney General, who intervened in the matter. The sale was cancelled.

The Securities Commissioner subsequently served on Brewster an "Order to Show Cause" why Brewster should not be fined and her registration as an agent suspended for a period of ninety days.

Brewster was charged by the Commissioner with

> "recommending to customers the purchase of a low-priced speculative stock that is clearly unsuitable for them in view of their financial position, and encouraging a customer to falsify the amount of his net worth in order to complete such a sale [both of which] are dishonest and unethical practices prohibited by § 11-412(a)(7) of the Maryland Securities Act, . . . and also violat[ive of] § 2 of the Rules of Fair Practice of the National Association of Securities Dealers, Inc."

The matter was referred to a Hearing Officer, Mark A. Sargent,[3] who, after a hearing, concluded that the manner in which Brewster sold the stock to Lang made the transaction "wholly unsuitable." Sargent found that Brewster's conduct amounted to "dishonest and unethical practices" within the meaning of the Maryland Securities Act, Corps. & Ass'ns Art., § 11-412(a)(7). Those findings led Sargent to recommend that Brewster's registration be suspended for thirty days and that she be fined

---

[3]Sargent is a professor at the University of Baltimore School of Law where, among other subjects, he teaches Securities Regulations.

$100. The recommendations were adopted by the Commissioner. Brewster then appealed to the circuit court, which, as we have observed, affirmed. In this Court no factual findings by the Hearing Officer or trial court are in dispute.

The Issues

I. Was Brewster denied due process of law because Md. Ann. Code, Corps. & Ass'ns Art. § 11-412(a)(7) is violative of the Constitution?

II. Has the State violated Brewster's First Amendment commercial free speech rights?

I.

The Constitutionality of the Statute

The lack of dispute as to the fact findings of the Hearing Officer, Mark Sargent, are important to a resolution of this matter. It is now beyond question but that Brewster read the Compliance Manual of her employer, Stuart-James. That manual states that

> "implicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on the basis that can be judged as being within the ethical standards of the association's rules, with particular emphasis on the requirement to deal fairly with the public. . . . [S]ales efforts must be judged on the basis of whether they can be reasonably said to represent fair treatment for the person to whom the sales efforts are directed, rather than on the argument that they result in profits to customers."

The Compliance Manual twice reprinted Article III, § 2 of the National Association of Securities Dealers (NASD) Rules of Fair Practice. Section 2 of Article III of those rules provides:

> "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

Section 15A of the Securities Exchange Act of 1934, codified as 15 USCA, § 780(b)(7)(c) as amended by Act of June 4, 1975, Publ. L. No. 94-29, 89 Stat. 149, provides for the creation and promulgation of NASD rules. Those standards embody the ethical guidelines for the securities industry. *Lange v. Hentz & Co.*, 418 F. Supp. 1376, 1383 (N.D. Tex. 1976). The commentary to Art. III, Rule 2 declares:

> "Some practices that have resulted in disciplinary action and that clearly violate this responsibility for fair dealing are set forth below, as a guide to members:
>
> *Recommending Speculative Low-Price Securities*
>
> 1. Recommending speculative low-priced securities to customers without knowledge of or attempt to obtain information concerning the customers' other securities holdings, their financial situation . . . this has particular application to high pressure telephonic sales campaigns.
>
> *Recommending Purchases Beyond Customer Capability*
>
> 5. Recommending the purchase of securities . . . in amounts which are inconsistent with the reason-

> able expectation that the customer has the financial ability to meet such a commitment."

See NASD ¶ 2152.[4]

Brewster, at the time of registration with the Maryland Division of Securities, was registered with NASD. Hence, she knew or should have known of the NASD rules, having passed a test concerning those rules.

Admittedly, the Maryland Securities Act does not explicitly define "dishonest and unethical practices." The Act, § 11-412(a)(7), provides in pertinent part:

> "The Commissioner by order may deny, suspend, or revoke any registration if he finds that the order is in the public interest and that the applicant or registrant . . . : (7) Has engaged in dishonest or unethical practices."

The absence from the Maryland Act of a definition of the phrase "dishonest and unethical practices" does not, as Brewster suggests, preclude punishment for her conduct. Section 11-412(a)(7) does not stand as an independent, isolated proviso, free and clear of all other provisions of the securities law. Indeed, § 11-412(a)(7) must be read together with COMAR 02.02.02.02B. That rule exempts from written examination those agents who are registered with NASD. Hence, it is clear that the Maryland Securities Commissioner knew that Brewster was familiar with and had passed a comprehensive examination

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[4]The NASD was not created by the Congress or the SEC. It was developed in close association with the SEC and approved by the latter on August 7, 1939. Employees of NASD firms are required to pass a comprehensive examination which demonstrates the individual's knowledge of securities as well as the NASD rules and regulations.

on the NASD rules and regulations. Those rules included Article III, § 2, as above quoted.

The Hearing Officer found that Brewster did not inform Lang "of the specific risks noted in the prospectus," and that the stock would not have been purchased had those risks been disclosed. We think it patent that Brewster's sale to Lang of the highly speculative and risky securities, together with her suggestion that Lang misrepresent his net worth, violated Md. Ann. Code, Corps. & Ass'ns Article § 11-412(a)(7).

The Supreme Court sixty-two years ago declared in *Connally v. General Constr. Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926), that a penal statute must "be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *See also Bowers v. State,* 283 Md. 115, 120, 391 A.2d 341 (1981). Nevertheless, a broad statutory standard is not vague if it has a meaningful referent in business practice, custom, or usage. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 594 (1963).

The term "dishonest and unethical" has a meaningful referent in business practice and usage. It is found in both NASD Art. III, § 2 and Stuart-Jame's Compliance Manual. Brewster either knew or should have known that the particular sale to Lang and the deception she had him practice with respect to his net worth were proscribed conduct.

In *Erdos v. S.E.C.*, 742 F.2d 507, 508 (9th Cir. 1984), the Court noted that when applying the NASD rule pro-

hibiting unsuitable recommendations the pivotal question is whether the dealer made "only such recommendations as would be consistent with the customer's financial situation and needs," quoting *Phillipps & Co.*, 37 S.E.C. 66, 70 (1956). *See also Harold R. Fennocchio,* 3 Fed. Sec. L. Rep. (CCH) § 25,797.25 (1976). The latter cases held that Art. III, 2 was violated when a broker failed to make serious inquiry into the suitability of customer's investments.

Affording further clarification of the words in question is found in *Webster's Third New International Dictionary of the English Language Unabridged* (1976). That tome defines the adjectives as follows:

> "dishonest—characterized by lack of truth, honesty, probity, or trustworthiness or by an inclination to mislead, lie, cheat, or defraud.
>
> unethical—not conforming to approved standards of behavior, a socially accepted code, or professionally endorsed principles and practices."

Within the stock brokerage business, unethical and dishonest conduct is clearly defined by the NASD Manual. Since Brewster passed the comprehensive examination on the NASD manual, she was expected to be aware of the norms of her industry. Additionally, the Stuart-James Compliance Manual, administrative and judicial decisions, and Webster's dictionary provided her with further guidance.

We hold that Md. Ann. Code, Corps. & Ass'ns Article § 11-412(a)(7) is not constitutionally infirm. It is not ambiguous, indefinite, uncertain, or vague. Rather, the statute is clear and concise and proscribes definite areas

of conduct. As we see it, Brewster knew that what she did was dishonest and unethical. She knew it was improper to fail to advise Lang of the inherent risks in investing in highly speculative stock. She further knew that encouraging Lang to falsify his net worth, in order for her to conclude a transaction, was equally improper, irresponsible, misleading, and dishonest. Judge Friedman did not err in upholding the Commissioner's findings.

II.

Commercial Free Speech

Md. Ann. Code, Corps. & Ass'ns Article § 11-412(a)(7) restricts commercial speech, that which is directed solely to the economic interest of the speaker and his or her listeners. Justice Powell in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561-62, 100 S.Ct. 2643, 65 L. Ed. 2d 341 (1980), wrote:

> "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."

The nature of the protection afforded by the constitution to the utterer of the speech depends upon the expression and the governmental interest invoked. *Id.* 447 U.S. at 563. The State, *Central Hudson* holds, "may ban forms of communication [that are] more likely to deceive the public than to inform it." *Id.*

The Court articulated a four prong analysis for applying the First Amendment to challenged communications. Those four prongs are:

1. The commercial speech "must concern lawful activity and not be misleading."

2. "[T]he asserted governmental interest" must be "substantial."

If the analysis of 1 and 2 *both* yield positive responses, then the Court considers:

3. "Whether the regulation directly advances" the State's asserted interest.

4. Is the regulation more extensive than is necessary to serve the interest asserted.

The first prong of the analysis makes clear that to fall within the ambit of the First Amendment's protective umbrella the speech may be neither misleading nor directed toward unlawful activity. In the matter *sub judice,* Brewster's statements to Lang with respect to the purchase of CXR stock and the inherent risk factors involved were, at least, misleading. Therefore, her statements are not protected by the First Amendment's free speech proviso. Since the statements in question do not satisfy *Central Hudson's* first prong, there is no need for us to consider whether the other three tines are sated.

There was no violation of Brewster's First Amendment rights.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

MARIA BRUEHWILER BREWSTER,	)	IN THE
	)	
	)	CIRCUIT
Appellant	)	COURT FOR
	)	
vs.	)	BALTIMORE
	)	CITY
SECURITIES COMMISSIONER, OFFICE OF THE ATTORNEY GENERAL, MARYLAND DIVISION OF SECURITIES	)	Case No. 87180061/ CL67792
	)	
Appellee	)	

MEMORANDUM AND ORDER

This is an appeal from a final order dated May 28, 1987, of the Maryland Division of Securities (the Division). The Commissioner fined the Appellant $100 prospectively and suspended her registration for 30 days in the event she again applies for such registration. The imposition of discipline was based upon a violation of *Corporations and Associations,* § 11-412(a)(7), the Maryland Securities Act (the Act).

Findings of Fact and Concluusions of Law were issued by the designated Hearing Officer, Mark A. Sargent, as modified by Jack Schwartz, Chief Counsel Opinions and Advice, Office of the Attorney General, who was delegated to review the decision of the Hearing Officer on exceptions. Conclusion #1 as modified is as follows:

> Mrs. Brewster's recommendation of CXR stock to Mr. and Mrs. Lang was made without regard for whether the recommendation was suitable for those investors. By making a recommendation without regard for its suitability and by inducing Mr. Lang to

misrepresent his net worth she engaged in 'dishonest or unethical practices' under section 11-412(a)(7) of the Act. *Ruling on Exceptions* pp. 10-11.

Otherwise, the proposed Findings of Fact and Conclusions of Law of the Hearing Officer were adopted as the Securities Commissioner's.

Appellant in her petition for review contends that she was denied the right to due process of law under the 5th and 14th Amendments of the United States Constitution. Additionally, she asserts in her Petition for Review that, "the Division . . . has deprived her of due process rights, in that it committed errors of law finding against her, and that it acted arbitrarily and capriciously . . . ." On October 30, 1987, during oral argument before this Court, Appellant raised the issue of commercial speech protection under the 1st Amendment.

In exercising its power to review administrative decisions, the Court is governed by the Administrative Procedure Act. The *State Government Article* § 10-215 provides that the Court may:

(1) remand the case for further proceedings;

(2) affirm the decision of the agency; or

(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:

(i) is unconstitutional;

(ii) exceeds the statutory authority or jurisdiction of the agency;

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material and substantial evidence in light of the entire record as submitted; or

(vi) is arbitrary or capricious.

Appellant throughout the administrative proceedings did not challenge the findings of fact nor does she do so on appeal. Her contention is that the decision to deprive her of her license is unconstitutional because neither the statute nor the suitability rule of the National Association of Securities Dealers (NASD), upon which the Division relied to give definition to the statute, provides reasonably specific standards to warn Appellant of the conduct to be avoided. Furthermore, Appellant argues that allowing "the use of a neblous and shifting definition of 'suitability'" by the Commissioner results in an arbitrary and capricious decision.

The Supreme Court in *United States v. National Dairy Products Corp., Et Al.*, 372 U.S. 29 (1963) made clear that a broad statutory standard is not vague if it has "a meaningful referent in business practice or usage." Article III, § 2 of the Rules of Fair Practice of the National Association of Securities Dealers provides as follows:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

Moreover, the suitability requirement does not lack definition and specific criteria to evaluate suitability as Appellant claims. The Court agrees with Mr. Schwartz's analysis where he stated:

> Given the range of practices against which the Legislature sought to protect the investing public, these broad terms are necessary and are not themselves unconstitutionally vague. *See United States v. Persky,* 520 F. 2d 283 (2nd Cir. 1975). ...
>
> Nor is there any intrinsic due process problem when the broad proscriptions of the act are enforced by reference to previously articulated industry standard. Indeed, broad language of the kind in § 11-412(a)(7) is constitutionally permissible in part because a member of the regulated industry can be expected to be aware of industry norms. *See United Stated National Dairy Products Corp.,* (sic) 372 U.S. 29, 33-35 (1963.) *Ruling on Exceptions* p. 5.

Appellant further argues that encouraging the customer in this case to "pick a higher number" for his net worth is not a dishonest or unethical business practice. Since there was no "breach of any duty owing from the salesman to the customer there can be no violation of the Statute." As Mr. Schwartz stated, "This narrow construction of § 11-412(a)(7), for which the Respondent offers no authority, is utterly without merit." *Ruling on Exceptions* p. 11.

Appellant raises for the first time her right to "the protection of commercial free speech accorded by the First Amendment . . . ." Appellant's statements to the customers regarding the purchase of the stock and the inherent risks were misleading. Furthermore, encouraging the customer to falsify his net worth was dishonest. Her "commercial messages," misleading under the circumstances of this case, are, therefore, not protected by the 1st Amendment. *Central Hudson Gas & Electric Corp. v. Public Service Comm.,* 447 U.S. 557 (1980).

In the numerous briefs filed by Appellant she has focused on the issue of suitability of stock recommendations to the customer under the circumstances in this case. This emphasis avoids the point that she encouraged the customer to misrepresent his net worth. A review of the entire record shows that if suitability alone were the complaint the outcome may have been different. Clearly, "encouragement to the Langs to 'pick a higher number' with respect to the Lang's net worth," *Appellant's Brief in Support of Her Petition for Review Administrative Order* p.11, is an unethical or dishonest practice within the meaning of the Act.

Wherefore, this 23rd day of December, 1987, The Findings of Fact and Conclusions of Law of the Hearing Officer as modified and which were adopted by the Securities Commissioner are affirmed.

/s/ Kathleen O'Ferrall Friedman
Kathleen O'Ferrall Friedman
Judge

cc. Donald T. Trinen, Esquire
Christa D. Taylor, Esquire
Sarah McCafferty, Esquire

IN THE MATTER OF:	) Administrative
	) Proceeding
	)
	) Before The
MARIA BRUEHWILER BREWSTER, AGENT	)
	) Securities
	) Commissioner
	)
	) Office Of The
Respondent	) Attorney General,
	) Maryland Division
	) Of Securities

RULING ON EXCEPTIONS

I

Background

On February 28, 1986, the Securities Commissioner, in an Order to Show Cause, alleged that Maria Bruehwiler Brewster had engaged in "dishonest or unethical practices" prohibited by § 11-412(a)(7) of the Maryland Securities Act.[1] Specifically, the Order to Show Cause alleged "that recommending to customers the purchase of a low-priced speculative stock that is clearly unsuitable for them in view of their financial position, and encouraging a customer to falsify the amount of his net worth in order to complete such a sale" violated the Act. On June 30, 1986, a hearing on this matter was held before Hearing Officer Mark A. Sargent.

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[1] The Act is codified as Title 11 of the Corporations and Associations Article, Annotated Code of Maryland.

In his subsequent Findings of Fact and Conclusions of Law,[2] the Hearing Officer concluded that Mrs. Brewster's recommendation of the particular stock to the customers in question, Mr. and Mrs. Lang, "was a recommendation unsuitable for those investors." Conclusion #1. The hearing officer further found that: "By making this unsuitable recommendation and by inducing Mr. Lang to misrepresent his net worth [Mrs. Brewster] engaged in 'dishonest or unethical practices' under section 11-412 (a)(7) of the Act." *Id.* The Hearing Officer recommended issuance of a final order suspending Mrs. Brewster's registration for a period of 30 days and fining her $100. Conclusion #2.

On November 6, 1986, I was delegated the responsibility of deciding this matter on behalf of the Securities Commissioner. On February 24, 1987, I heard argument on the parties' exceptions to the Hearing Officer's decision. Both parties subsequently filed additional briefs, the Division on March 17, 1987 and the Respondent on April 6, 1987. The final decision that follows is based on the entire record of these proceedings.

II

Exceptions to Findings of Fact

The Respondent did not file exceptions to any of the Hearing Officer's findings of fact. The Division excepted to aspects of three of the findings of fact.

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[2] The Hearing Officer's decision is divided into numbered findings of fact, to be referred to here as "Finding #—"; numbered conclusions of law, to be referred to as "Conclusion #—"; and a legal analysis, to be referred to as "Analysis at —."

I deny the Division's request for changes in Finding #8 and Finding #24. There is evidence in the record to support the factual inferences that the Hearing Officer drew from the testimony.

The Division's third exception seeks to add to Finding #35, which the Division acknowledges is otherwise correct, an additional statement about Mrs. Brewster's subsequent employment history and the status of her pregnancy at the time that she left the employ of Stuart-James. Discerning little relevance in the proposed addition, I deny this exception as well.

III

Exceptions to Conclusions of Law

The Respondent takes exception to both aspects of the Hearing Officer's conclusion about liability—i.e., that Mrs. Brewster had violated the Act by making an unsuitable recommendation and by inducing Mr. Lang to misrepresent his net worth. Conclusion #1.[3] The Division, while agreeing on the whole with the Hearing Officer's conclusions, excepts to two specific aspects of his analysis.

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[3] The Respondent suggests that the Hearing Officer treated the matter of misrepresentation merely as an element in weighing the appropriate sanction, rather than as a distinct basis for finding liability. Respondent's Response to the Division's Exceptions and Reply to the Division's Response at 7. Although the Hearing Officer indeed observed that Mrs. Brewster's inducing of Mr. Lang to misrepresent his net worth was a factor justifying the sanction of suspension, nevertheless Conclusion #1 expressly states that inducing the misrepresentation was itself a violation of the Act.

A. *Suitability*

Article III, § 2 of the Rules of Fair Practice of the National Association of Securities Dealers provides as follows:

> "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the fact, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

The Hearing Officer held that the ethical standard embodied in this and other industry rules "may be used as an interpretive context for determining the meaning of 'dishonest or unethical practices' under section 11-412(a)(7) of the Act." Analysis at 17. The Hearing Officer went on to characterize industry standards as a "source of guidance" in applying § 11-412(a)(7). *Id.*

The Respondent contends that disciplining Mrs. Brewster under the Act for a violation of this NASD rule would violate her right to due process of law. This is so, the Respondent argues, because the concept of suitability lacks defining standards; hence, the Act gives no meaningful notice that conduct proscribed by the suitability rule is prohibited. As the Respondent argued:

> "In this case, . . . reasonable m[e]n could differ that this conduct violated a suitability requirement. As the testimony at the hearing showed, it's a fluid concept. Equally competent compliance management personnel could decide that a certain individual . . . should not be involved in a certain stock, and he could take the same set of facts, and put it in front of somebody else, [and] get a different conclusion. Under those circumstances to apply that standard . . . to these facts

where there are no intervening guidelines or parameters to put a broker on notice . . . [is] unconstitutional as applied in this case." Transcript of Argument on Exceptions at 16-17.

The Respondent's underlying premise is correct. A law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

However, the "fair warning" that due process requires varies from one context to another. Statutes embodying economic regulation are subject to less stringent safeguards against vagueness than statutes affecting constitutionally protected rights, in particular free speech. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

The Respondent does not attack the Act's proscription of "dishonest or unethical practices." § 11-412(a)(7). Given the range of practices against which the Legislature sought to protect the investing public, these broad terms are necessary and are not themselves unconstitutionally vague. *See United States v. Persky*, 520 F.2d 283 (2nd Cir. 1975). *Cf. Sears, Roebuck & Co. v. FTC*, 258 F. 307 (7th Cir. 1919) (phrase "unfair methods of competition" in FTC Act not unconstitutionally vague).[4]

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[4] What a committee of Congress long ago observed about the regulation of business practices generally is certainly true of the regulation of securities dealing as well:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventive-

(Continued on following page)

Nor is there any intrinsic due process problem when the broad proscriptions of the Act are enforced by reference to previously articulated industry standards. Indeed, broad language of the kind in § 11-412(a)(7) is constitutionally permissible in part because a member of the regulated industry can be expected to be aware of industry norms. *See United States National Dairy Products Corp.*, 372 U.S. 29, 33-35 (1963). A broad statutory standard is not vague if it has "a meaningful referent in business practice or usage." 372 U.S. at 36. *Cf. Small Co. v. American Sugar Refining Company*, 267 U.S. 233, 240-41 (1925) (statutory prohibition of "any unjust or unreasonable rate or change" unconstitutionally vague, given that "that there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . .").

Any broker should expect that the Act's proscription of "*unethical* practices" will be interpreted in light of the NASD rules, for these rules embody "ethical guidelines" for the securities industry. *Lange v. H. Hentz & Co.*, 418 F.Supp. 1376, 1382 (N.D. Tex. 1976). The court continued:

> "NASD rules, however imprecisely they are drafted, do prescribe conduct which the NASD member should attempt to achieve. Traditionally, rules of this sort have served as bench marks for a determination of the reasonableness of a defendant's action.
>
> . . .

(Continued from previous page)

ness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." H. R. Rep. No. 1142, 63 Cong., 2d Sess. 19 (1914).

> Thus, while not implying a civil right of action from NASD Rules, I do focus on their nature as a functional guide which provides a means to determine the standard of commercial morality which is expressly sought by NASD members." 418 F.Supp. at 1383-84.

Such a "standard of commercial morality" is plainly pertinent to the enforcement of § 11-412(a)(7).[5] *Cf. Maine Real Estate Comm'n v. Kelby,* 360 A.2d 528, 532 (Me. 1976) (statutory prohibition of, *inter alia,* "improper dealings" amounts to "a codification of the normative standards which guide the conduct of the members of the real estate profession").

Thus, as the Respondent acknowledges, the vagueness challenge comes down to the question of whether the NASD suitability rule is itself standardless, as the Respondent argues:

> "There isn't any body of administrative decisions on unsuitability, particularly not involving any regulators that have the power to affect your livelihood, like the SEC or State Securities Commission. There is no body of law at all. That's why we're complaining. If there was a body of law, it could take the place of guidelines in the statute. It could say, 'Well, this professional has notice of the standards because they've been adjudicated in all these different occasions.' Nothing like that here." Argument at 48.

In my view, however, the NASD suitability requirement does reflect an articulable standard that properly

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[5] In *Lange,* the court declined to find a federal cause of action from an alleged breach of NASD rules, including the suitability rule. But the court expressly recognized that "remedies . . . may exist in the state system for breach of NASD rules." 418 F.Supp. at 1380.

may be applied case-by-case, just as broad standards elsewhere in the law have commonly evolved. *Cf. FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

The NASD suitability rule is not a recent invention. It was adopted in 1939. *See* Roach, *The Suitability Obligation of Brokers: Present Law and the Proposed Federal Securities Code*, 29 Hastings Law J. 1059, 1074 n. 22 and accompanying text (1978).

The rule has, in prior SEC cases, served as a basis of liability. Indeed, the SEC has itself already rejected the argument that the NASD suitability rule, along with other NASD rules, is "so vaguely worded that they provide no ascertainable standard of guilt." In rejecting this contention, the SEC found that the NASD rules were sufficiently specific to provide a standard for broker conduct. *In re Boren*, 40 S.E.C. 217 (1960).

While no two cases are likely to present identical facts, the suitability rule has been applied in circumstances comparable to those presented in this matter. For example, in *In re Philips & Co.*, 37 S.E.C. 66 (1956), the customers were "mature and intelligent persons" who had purchased speculative stock on the basis of "their own independent judgment and desire." Yet the SEC found that the broker, Bernheimer, had violated the suitability rule:

> "Bernheimer recommended the purchase of Quebec stock, an admittedly speculative security. The customers were not informed in securities matters and relied implicitly on Bernheimer's advice. . . . Whether or not [the] customers . . . considered a purchase of the stock . . . a suitable investment is not the test for determining the propriety of applicants' conduct in the situation before us. The test is whether Bern-

> heimer fulfilled the obligation he assumed when he undertook to counsel the customers, of making only such recommendations as would be consistent with the customers' financial situation and needs. The record shows that Bernheimer knew all the facts necessary to enable him to realize that reasonable grounds for his recommendations did not exist."

See also Harold R. Fenocchio, 3 Fed. Sec. L. Rep. (CCH) ¶ 25,797.25 (1976) (rule violation because broker failed to make serious inquiry into the suitability of the customer's investments).

Apart from these SEC decisions, guidance as to the meaning of the suitability rule was provided long ago by the NASD itself. In a 1964 policy statement, the NASD described the following as violations of the suitability rule: "Recommending speculative low-priced securities to customers without knowledge of or attempt to obtain information concerning the customer's other securities holdings, their financial situation and other necessary data. The principle here is that this practice by its very nature, involves a high probability that the recommendation will not be suitable for at least some of the persons solicited." NASD, Special Report to NASD Members (October, 1964), NASD Manual (CCH) ¶ 2152.

In this case, the Hearing Officer found facts that led him to conclude that Mrs. Brewster had failed to conform her conduct to the basic requirements of the suitability rule. The customers, though intelligent and well educated, had no experience in the trading of speculative securities. Finding #28 and Finding #29. They did not fully understand "the highly speculative and risky nature of this investment" until they read the prospectus, after the sale,

and Mrs. Brewster had not informed them of these risks. Finding #24. Mrs. Brewster knew that she was dealing with novices, because she was told by Mr. Lang "that this would be the first time they had purchased stock. . . ." Finding #11. Mrs. Brewster also failed to inquire whether the Lang's investment objectives would be better served through less speculative securities. Finding #8.

The Respondent argues that the pertinent inquiry is "whether sufficient standards exist so that Brewster would have been able to determine, before the fact, that *this investment* by *these investors* would violate the so-called 'suitability' doctrine." Respondent's Answer Memorandum at 1 (emphasis in original).

In my view, however, this formulation misstates the pertinent inquiry. The proper question is whether sufficient standards exist so that Mrs. Brewster would have been able to determine, before the fact, *what an ethical broker should do* before urging this investment on these investors. For the reasons discussed above, sufficient standards for this determination do exist, and Mrs. Brewster breached those standards.[6] She made no effort to undertake a good faith inquiry into the Langs' understanding of risk and their investment situation before encouraging them to buy speculative, low-priced stock. Analysis at 18-21. Mrs. Brewster's failure in this regard, as the Hearing Officer concluded, constitutes an "unethical practice" prohibited by § 11-412(a)(7).[7]

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[6] Mrs. Brewster was aware of the suitability rule and its purposes. Finding #36. *See also* Finding #39 and Finding #40.

[7] I do not accept the Respondent's argument that allowing an after-the-fact examination of whether a broker violated his

(Continued on following page)

Because, in my view, the proper focus of the suitability rule is on the entirety of the broker's conduct, rather than on the suitability of the investment recommendation as such, I believe that Conclusion #1 of the Hearing Officer requires some rewording. As modified, Conclusion #1 is as follows:

> "Mrs. Brewster's recommendation of CXR stock to Mr. and Mrs. Lang was made without regard for whether the recommendation was suitable for those investors. By making a recommendation without regard for its suitability and by inducing Mr. Lang to misrepresent his net worth she engaged in 'dishonest or unethical practices' under section 11-412(a)(7) of the Act."[8]

B. *Inducing a Falsification*

The Hearing Officer found that Mrs. Brewster had engaged in a dishonest or unethical practice when she induced Mr. Lang to misrepresent his net worth. Conclusion #1.[9] The Respondent contends that the misrepresentation

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(Continued from previous page)

or her ethical duty to avoid unsuitable recommendations would cast into doubt every sale of a speculative stock. Argument at 31-32. But, in any event, this invocation of a speculative "parade of horribles" is beside the point:

> "As a general rule, the constitutionality of a statutory provision under attack on void-for-vagueness grounds must be determined strictly on the basis of the statute's application to the particular facts at hand. Thus, it will usually be immaterial that the statute is of questionable applicability in foreseeable marginal situations, if a contested provision clearly applies to the conduct of the defendant in a specific case." *Bowers v. State*, 283 Md. 115, 22 (1978) (citations omitted).

[8] I consider, and affirm, the misrepresentation aspect of this conclusion in Part III B below.

[9] See note 3 above.

was inconsequential and was not directed to the Langs. "Thus, such cannot constitute an 'unethical or dishonest practice' under the statute as a matter of law, as such plainly requires that a *customer* be deceived." Respondent's Answer Memorandum at 6 (emphasis in original).

This narrow construction of § 11-412(a)(7), for which the Respondent offers no authority, is utterly without merit. To be sure, dishonesty toward the customer is the core of the evil that the General Assembly sought to proscribe. But, in my view, the General Assembly also intended to prohibit any form of dishonesty by broker-dealers or agents in the handling of transactions. One kind of dishonesty leads to another, to the ultimate injury of customers and the deterioration of public confidence in the integrity of the securities market.[10]

The plain and uncontroverted fact is that Mrs. Brewster urged Mr. Lang to falsify a piece of information that she herself thought was important: "Upon hearing [the correct] amount, Mrs. Brewster informed Mr. Lang that $10,000 was not a high enough net worth and that he would have to 'pick a higher number' . . . or the transaction would not be approved." Finding #16. This is, without question, a "dishonest or unethical practic[e]," within the meaning of § 11-412(a)(7).[11]

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[10] Indeed, in this case the Langs may well have been injured as a result of Mrs. Brewster's encouraging Mr. Lang to falsify his net worth. As the Respondent concedes, had the net worth been accurately stated, the management of Stuart-James might have done what Mrs. Brewster should have done—inquire into the suitability of this transaction for these customers. Argument at 26.

[11] That Mr. Lang cooperated with the dishonesty does not absolve Mrs. Brewster. *See Eichler v. Berner*, 472 U.S. 299 (1985).

C. *Division's Exceptions*

The Division requested two modifications in the Hearing Officer's Analysis, to conform the Analysis to the Division's proposed modifications to Findings #8 and Finding #24. *See* Division's Exceptions and Response at 3-4. Because I have denied the Division's exceptions as to these Findings, I likewise deny the requested modifications of the Analysis.

IV

Conclusion

For the reasons stated above, and except as specifically indicated in Part III A, I adopt the findings of fact and conclusions of law of the Hearing Officer. I further concur with the Hearing Officer's recommendation that the violations of the Act justify an order (i) suspending the agent registration of Mrs. Brewster for a period of thirty days, as authorized by § 11-412;[12] and (ii) fining Mrs. Brewster $100, as authorized by § 11-417. A final order of the Commissioner is attached. Under § 11-704(a) of the Act, the Respondent may obtain judicial review of this order "in conformity with the procedure prescribed in the Maryland Rules of Procedure and in the Administrative Procedure Act."

/s/ Jack Schwartz
Jack Schwartz
Chief Counsel
Opinions and Advice

DATED: May 28, 1987

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[12] Mrs. Brewster is not currently registered. *See* Finding #35 and Analysis at 23-24. Therefore, the suspension will become effective should she re-apply for registration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 1987, a copy of the foregoing Ruling on Exceptions and the accompanying Final Order was mailed, postage prepaid, to: Donald T. Trinen, Esquire, Christa D. Taylor, Esquire, Hart & Trinen, 1624 Washington Street, Denver, Colorado 80203, Jeffrey S. Rosen, Esquire, Stoppelman, Rosen & DeMartino, 1818 N. Street, N.W., Suite 400, Washington, D.C. 20036, Sarah McCafferty, Esquire, Assistant Attorney General, Division of Securities, Office of the Attorney General, 7 N. Calvert Street, Munsey Building, 4th Floor, Baltimore, Maryland 21202.

/s/ Jack Schwartz
Jack Schwartz

IN THE MATTER OF:	)	Administrative
	)	Proceeding
	)	
	)	Before The
MARIA BRUEHWILER	)	
BREWSTER, AGENT	)	Securities
	)	Commissioner
	)	
	)	Offices Of The
Respondent	)	Attorney General,
	)	Maryland Division
	)	Of Securities

FINAL ORDER

IT IS ORDERED this 28th day of May, 1987, that the proposed Findings of Fact and Conclusions of Law of the Hearing Officer are hereby adopted as the Securities Commissioner's Findings of Fact and Conclusions of Law, except that Conclusion of Law #1 is modified as set forth in Part III A of the accompanying Ruling on Exceptions.

IT IS FURTHER ORDERED that, in the event that Maria Bruehwiler Brewster again applies for registration as provided in § 11-405 of the Maryland Securities Act, such registration shall be suspended for a period of 30 days after the registration otherwise would have become effective.

IT IS FURTHER ORDERED that Maria Bruehwiler Brewster shall, within 30 days, remit to the Securities Commissioner a fine of $100, in a form of payment approved in advance by the Division of Securities.

AND IT IS FURTHER ORDERED that, if Maria Bruehwiler Brewster does not comply with the provisions of this Order, the Division of Securities may proceed to

enforce the Order pursuant to the provisions of the Maryland Securities Act.

/s/ Jack Schwartz
Jack Schwartz
Chief Counsel
Opinions and Advice

IN THE MATTER OF:	) Administrative) Proceeding)) Before The)
MARIA BRUEHWILER BREWSTER, AGENT	) Securities) Commissioner)
Respondent	) Offices Of The) Attorney General,) Maryland Division) Of Securities) Munsey Building,) 4th Floor) Calvert and) Fayette Streets) Baltimore,) Maryland 21202

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE HEARING OFFICER

I. Procedural History

On February 28, 1986, Susan Merrick Rittenhouse, Securities Commissioner of the State of Maryland (the Commissioner) issued an Order to Show Cause (the Order) to Respondent Maria Bruehwiler, who at that time was an agent registered with the Maryland Division of Securities (the Division) and employed by the Stuart-James Company, Inc. (Stuart-James) at its office in Columbia, Maryland. (Ms. Bruehwiler is now using her married name of Brewster and will therefore be referred to by that name in these Findings of Fact and Conclusions of Law.) The Order alleged that Mrs. Brewster engaged in specified "dishonest and unethical practices" under section 11-412 (a)(7) of the Maryland Securities Act, Maryland Corpora-

tions and Associations Article, Title 11, Annotated Code of Maryland (the Act), and directed Mrs. Brewster to appear at the Division to show cause why an order should not be entered suspending her registration as an agent for a period of 90 days, as provided by section 11-412 of the Act, and fining her $100 for violation of the Act, as provided by section 11-417 of the Act. Mrs. Brewster, by her counsel Donald T. Trinen, requested a hearing in a timely fashion. The hearing was held before the designated Hearing Officer, Mark A. Sargent, on June 30, 1986 at the Offices of the Maryland Attorney General (the Hearing).[1]

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1. It should be noted that the Order was captioned *"In the Matter of The Stuart-James Company, Inc. and Maria Bruehwiler, Agent,"* although the Order did not allege any violations of Maryland law on the part of Stuart-James. At the Hearing counsel for the Division indicated that the caption merely demonstrated that the present case is part of an ongoing investigation by the Division of Stuart-James' activities in Maryland. Transcript of Hearing held June 30, 1986, at 7 (hereinafter cited as "Tr.") In view of that fact the Hearing Officer declined to recommend to the Commissioner that Stuart-James' name be deleted from the caption. *Id.* at 8-9. Subsequent to the Hearing., however, the Division has deleted Stuart-James' name from the caption used in its briefs. See Brief of the Maryland Division of Securities; Reply Brief of the Maryland Division of Securities. In view of this change, and in view of the fact that violations of Maryland law by Stuart-James have been neither alleged by the Division nor found by the Hearing Officer in connection with this case, the caption above refers only to "Maria Bruehwiler Brewster, Agent." The limitation of these Findings of Fact and Conclusions of Law to Mrs. Brewster, however, is not intended to function as an exculpation of Stuart-James in connection with any violations of Maryland law that may have occurred in this or any other case. It simply reflects the fact that the Hearing Officer was not called upon to determine whether Stuart-James violated Maryland law in this case.

II. Findings of Fact

1. Maria Bruehwiler Brewster was at all times relevant to this case an agent registered with the Maryland Division of Securities and employed by Stuart-James at its Columbia, Maryland office. Mrs. Brewster's agent registration with the National Association of Securities Dealers, Inc. (NASD) and with the State of Maryland was terminated by her employer Stuart-James after it discharged her in 1986.

2. Douglas C. Lang and Holly A. Lang, his wife, are and were at all times relevant to this case residents of the State of Maryland.

3. Mr. Lang graduated from college with a degree in civil engineering. Transcript of Hearing held June 30, 1986 (hereinafter cited as "*Tr.*") at 61. He took no business or finance courses in college. *Id.* He is employed as an engineer specializing in computer-aided drafting and design. *Id.* at 16.

4. Mrs. Lang graduated from college in 1981 with a degree in Health Science. *Id.* She is employed as a salesperson with a medical equipment company. *Id.* at 84.

5. On or about November 12, 1985, Mrs. Brewster contacted Mr. Lang by telephone at his office. *Id.* at 17-18. Mrs. Brewster had obtained Mr. Lang's name from one of his co-workers, David Stewart, and Mr. Lang was expecting her call. *Id.* at 49. Mrs. Brewster and Mr. Lang had never spoken before, and Mrs. Brewster knew nothing about him except his place of employment. *Id.* at 165, 171.

6. During this telephone conversation, Mrs. Brewster described the stock of CXR Telecom Corporation (CXR)

and its business to Mr. Lang and told him why she thought the company would be successful. *Id.* at 18. Mr. Lang had no knowledge of CXR stock other than what Mrs. Brewster told him on the telephone. *Id.* at 19.

7. During the period immediately prior to this telephone conversation, Mrs. Brewster had been "touting" CXR stock. Tr. at 166. She considered it her "favorite" stock, and she thought that it "was going to be the best risk for anybody who was getting into the market." *Id.*

8. During the initial part of her conversation with Mr. Lang, Mrs. Brewster worked from a prepared script. *Id.* at 168-69, 159. Pursuant to this prepared script, Mrs. Brewster informed Mr. Lang that "[m]y specialty is making my clients money through a speculative stock portfolio. Taken alone, these stocks are risky, but to play them intelligently, you have to invest in a portfolio of 3-5 stocks." State's Ex. #16. While Mrs. Brewster's actual language may have varied somewhat from the precise terms of the script, she did not provide Mr. Lang with any specific or detailed information prior to his purchase about the particular risk factors associated with CXR stock. *Id.* at 18, 168-69. She also did not attempt to assemble a portfolio of securities for him, or to interest him in less speculative securities.

9. Mrs. Brewster informed Mr. Lang that she would "get them out before they lost all of their money." *Id.* at 190.

10. Mrs. Brewster informed Mr. Lang that she would be able to obtain the stock at the price she quoted, $.15/share, only if Mr. and Mrs. Lang purchased it by the

end of that day, *id.* at 20, although the Langs subsequently purchased the stock from Mrs. Brewster on the following day for the same price. State's Ex. No. 6.

11. Mr. Lang told Mrs. Brewster that he would not be able to decide whether to invest in the stock without discussing it with his wife. He stated that this would be the first time they had purchased stock, and that if this investment was not successful, it would affect any purchases of stock in the future. *Id.* at 18. Mrs. Brewster then offered to discuss the purchase with Mrs. Lang. *Id.* at 38.

12. Mr. Lang told Mrs. Brewster that he and his wife could obtain the money necessary for this purchase from the money market account they maintained at Charles Schwab & Co., Inc. (Schwab). Mrs. Brewster volunteered to call Schwab to find out how the money could be obtained. *Id.* at 22, 173. Mrs. Brewster later called Mr. Lang to explain how he could obtain funds from the Schwab money market account. *Id.* at 22, 174.

13. That evening, Mrs. Brewster called Mrs. Lang at the Langs' home to discuss this investment. *Id.* at 85. Mrs. Brewster did not discuss Mrs. Lang's investment experience, income, or net worth with her. *Id.* at 87. Mrs. Brewster told Mrs. Lang that the CXR stock was "going to take off" and that the Langs should buy it. *Id.* at 85. Mrs. Brewster did not discuss any specific risk factors associated with the purchase of the CXR stock, although she did inform Mrs. Lang that investing in stocks was risky, and that the CXR stock should be considered speculative. *Id.* at 89, 172. Mrs. Brewster also conveyed to Mrs. Lang the information that the stock had increased in price in

the last few weeks. *Id.* at 133, as well as her opinion that the price was probably going to keep going up. *Id.* at 133-34. Mrs. Lang told Mrs. Brewster that she would discuss the purchase with her husband and that she would contact Mrs. Brewster or Mrs. Brewster could contact her. *Id.* at 87. That night the Langs decided to buy the stock, acting in reliance on Mrs. Brewster's advice. *Id.* at 87, 116.

14. Mrs. Brewster called Mrs. Lang at her office the next morning to determine what she had decided about the purchase of the CXR stock. *Id.* at 88, 174. Mrs. Lang told Mrs. Brewster that they would purchase the stock and that she could call Mr. Lang to work out the details. *Id.*

15. Mrs. Brewster then called Mr. Lang at his office and he agreed to purchase the stock. *Id.* at 176; *see id.* at 24.

16. It was only at this point that Mrs. Brewster asked Mr. Lang about Mr. and Mrs. Langs' net worth. Mr. Lang informed her that it was $10,000. Mr. Lang knew their net worth because he had calculated it when the Langs opened their account at Schwab, *id.* at 21, on or about September 25, 1986, *id.* at 29, 37, only seven weeks before Mrs. Brewster first called him. The Lang's net worth is stated as $10,000 on the Schwab account application form. State's Ex. #9; *Tr.* at 106-07. Upon hearing this amount, Mrs. Brewster informed Mr. Lang that $10,000 was not a high enough net worth and that he would have to "pick a higher number", *Tr.* at 20-21, 58, 123, or the transaction would not be approved. *Id.* at 58. Mr. Lang supplied her with the higher figure of $50,000. *Id.*

17. During the telephone conversation in which Mr. Lang agreed to purchase the CXR stock, Mrs. Brewster informed him that he would be receiving a prospectus in the mail and that he should call her if he had any questions regarding it. *Id.* at 182-83.

18. Subsequent to their purchase of the CXR stock, whose trade date was recorded as November 15, 1985, *id.* at 144-45; State's Ex. #15, Mrs. Lang called the Schwab office and asked that a check for $1,550 be sent to them from their account in order to pay for the stock. *Tr.* at 104-05; 144-45. This money was withdrawn from the Langs' Schwab money market account on November 18, 1985. *Tr.* at 145; State's Ex. #12.

19. A few days after their purchase, and after Mrs. Lang had withdrawn $1,550 from the Langs' money market account at Schwab, Mr. Lang obtained a copy of the prospectus for CXR stock from a friend, Ray Chance, *Tr.* at 19, and reviewed its contents. *Id.* at 24. It was only after reading this prospectus did the Langs fully understand the highly speculative and risky nature of this investment. *Id.* at 23. Mrs. Brewster had not previously informed them of the specific risks noted in the prospectus. *Id.* at 25, 89. Neither Mr. Lang nor Mrs. Lang would have purchased the stock had they been made aware of the risks disclosed in the prospectus. *Id.* at 25-26, 89-90.

20. CXR is in the business of designing, manufacturing, and marketing electronic telecommunications testing equipment. Its prospectus states on its cover in bold type that the securities offered "involve a high degree of risk," and its text lists eleven specific risk factors. State's Ex. #1.

21. Mrs. Lang called Mrs. Brewster the day after she and Mr. Lang reviewed the prospectus to inform her that they had changed their minds after reading the prospectus and that they would not buy the stock because of the risk involved. *Tr.* at 90-91. During this conversation, Mrs. Brewster informed Mrs. Lang that the Langs could not change their minds and that they still had to pay Stuart-James $1,550. *Id.* Mrs. Brewster called Mrs. Lang again the same day to reiterate that a verbal contract was binding, that the Langs had to pay, and that Stuart-James would sue the Langs for the money. *Id.* at 91, 185.

22. In response to Mrs. Brewster's refusal to release the Langs from their obligation to purchase the CXR stock, Mrs. Lang telephoned the Division and spoke with Assistant Attorney General Sarah McCafferty for the purpose of determining whether they would be obligated to purchase the stock. *Id.* at 118-20.

23. In response to Mrs. Lang's inquiry, Ms. McCafferty telephoned Mrs. Brewster, *id.* at 186-87, and spoke with both Mrs. Brewster and Randall Jenkins, branch manager of the Columbia office of Stuart-James. *Id.* at 211, 222. After speaking with Ms. McCafferty, Mr. Jenkins cancelled the trade. *Id.* at 223. Ms. McCafferty subsequently informed the Langs that they would not be required to pay for the stock. *Id.* at 120.

24. At the time of this transaction, the Langs had never purchased stock, although they were interested in getting into the stock market, *id.* at 18, 63, and have subsequently purchased other stock, including stocks of a speculative nature. *Id.* at 67-69, 75.

25. On or about September 25, 1985, *id.* at 29-37; State's Ex. #9, seven weeks before Mrs. Brewster first called Mr. Lang, the Langs opened their account at Schwab on the advice of Mr. Lang's brother, a former stockbroker, who had suggested to the Langs that they have some money available in a discount brokerage account in the event he found an investment to recommend to them. *Tr.* at 32, 63. In connection with opening this account, the Langs requested permission from Schwab to trade options. They did so solely on the advice of Mr. Lang's brother, *id.* at 35, 43, 107-08, 114, although to the date of the Hearing they had not traded any options, *id.* at 137, and at the time the account was opened, neither understood how an option worked. *Id.* at 44, 74, 108, 114.

26. In October 1985, the Langs put in a limit order to purchase 200 shares of Computervision stock at $9/share for their Schwab account, but the order was never executed. *Id.* at 103; State's Ex. #11. The Langs decided to place this order based on research Mr. Lang had done for his employer on manufacturers of computer-aided design systems, the professional area in which he specializes. *Tr.* at 101, 109.

27. At the time the Langs opened their Schwab account and at the time they purchased the CXR stock, they had very little or no liquid net worth, *id.* at 34, 107, and had never bought stock, bonds, or options, *id.* at 36, 37. They opened the account when they came out of debt far enough to have $3,000 to invest, *id.* at 42, and a portion of this amount was borrowed. *Id.* at 76.

28. At the time the Langs' Schwab account was opened, Mr. Lang characterized his investment knowledge

as "Good," *id.* at 36; State's Exhibit #9, because he felt knowledgeable about a few companies operating in his field of compute-aided design and felt his brother would give him good advice. *Tr.* at 37-37. At the time of the Langs' purchase of the CXR stock, however, he did not understand such concepts as book value and price/earnings ratio, or that stock was traded in a market, *id.* at 40-41, and generally did not know "what was going on in the stock market." *Id.* at 45.

29. At the time the Langs' Schwab account was opened, Mrs. Lang's investment knowledge was characterized as "limited," *id.* at 108; State's Ex. #9, and she had virtually no investment knowledge at that time or when Ms. Brewster called her. *Tr.* at 108-09. To the date of the hearing in this case, Mrs. Lang did not know what a margin account was, *id.* at 102, although the Langs' Schwab account was a margin account. State's Ex. #9.

30. Mr. Lang viewed Mrs. Brewster as an "expert," and, because he viewed himself as an "extreme novice," relied on her professionalism in purchasing the CXR stock. *Id.* at 41.

31. At the time of the transaction with the Langs, Mrs. Brewster was in her early twenties, and had left Bryn Mawr College one course short of her undergraduate degree. *Id.* at 149, 197-98. At college she majored in geology and took introductory courses in economics, but did not study finance or business. *Id.* at 210.

32. After joining Stuart-James she completed a one-week external training program and a one-week internal training program. *Id.* at 153, 210.

33. Mrs. Brewster passed the Series 7 examination administered by the NASD and became registered on or about September 23, 1985. *Id.* at 154.

34. In the course of her employment as a registered agent for Stuart-James, Mrs. Brewster would dial 300 telephone numbers a day and complete 40 or 50 of these calls. *Id.* at 158.

35. In April of 1986 Mrs. Brewster was discharged by Mr. Jenkins, her branch manager, for lack of production. *Id.* at 222. After her discharge, Mr. Jenkins terminated her registration with the NASD. *Id.* at 196-97. At the Hearing, Mrs. Brewster characterized her departure from Stuart-James as a "maternity leave." *Id.* at 193.

36. At the time of the transaction with the Langs, the rules regarding the conduct of registered agents were fresh in Mrs. Brewster's mind. *Id.* at 199. In particular, her external and internal training programs and her reading of the Stuart-James Compliance Manual, Defendant's Exhibit #2, had made her familiar with an agent's suitability obligations with respect to recommendations. *Tr.* at 155-57. She understood that the purpose of the suitability rules was to protect investors both from themselves and "greedy bro[k]ers." *Id.* at 156-57. She also understood that Mr. Jenkins could disallow a trade if a customer's net worth were inadequate. *Id.* at 193, 203.

37. The Stuart-James Compliance Manual states that the "wholesale recommendation of a single security by a representative to his clients without thought to each individual's overall investment situation is simply not proper" and that a representative must "realize that his responsibility is greatest when he recommends the purchase

of . . . the stock of a little known, or new company." Defendants' Ex. #2, at 8.

38. The Stuart-James Compliance Manual states that "[i]mplicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on the basis that can be judged as being within the ethical standards of the association's rules, with particular emphasis on the requirement to deal fairly with the public. . . . [S]ales efforts must be judged on the basis of whether they can be reasonably said to represent fair treatment for the person to whom the sales efforts are directed, rather than on the argument that they result in profits to customers." *Id.* at 8-9.

39. The Stuart-James Compliance Manual twice reprints Article III, § 2 of the NASD's Rules of Fair Practice, *id.* at 8, 37, as well as the NASD's Board of Governor's policy statement on recommending speculative low-priced securities, *id.* at 9, and adds to the latter that "[p]articular attention should be paid to informing clients of the speculative nature of these investments." *Id.*

40. The Stuart-James Compliance Manual requires "every member" of that organization to "[u]se due diligence to learn the essential facts relative to every customer", *id.* at 12, and states that when a "representative is taking the initiative in seeking an account from a lead, all references should be checked. . . ." *Id.* at 13.

41. The Stuart-James Compliance Manual states that "[r]ecommending to a customer the purchase . . . of any security without reasonable grounds to believe that the

recommendation is suitable for the customer after reasonable inquiry concerning the customer's . . . financial situation and needs, and any other information known by the broker-dealer," *id.* at 33, is prohibited by Stuart-James. *Id.* at 32, 34.

42. Mrs. Brewster read the entire Stuart-James Compliance Manual. Tr. at 155-56.

II. Conclusions of Law

A. Conclusions

1. Mrs. Brewster's recommendation of CXR stock to Mr. and Mrs. Lang was a recommendation unsuitable for those investors. By making this unsuitable recommendation and by inducing Mr. Lang to misrepresent his net worth she engaged in "dishonest or unethical practices" under section 11-412(a)(7) of the Act.

2. In view of these "dishonest or unethical practices," it is in the public interest for the Commissioner to issue a final order suspending Mrs. Brewster's registration for a period of 30 days under section 11-412(a)(7) of the Act and fining her $100 under section 11-417 of the Act.

B. Analysis

Section 11-412(a)(7) of the Act provides that "[t]he Commissioner by order may deny, suspend or revoke any registration if he finds that the order is in the public interest and that the . . . registrant . . . [h]as engaged in dishonest or unethical practices." This provision is modeled on section 204(a)(G) of the Uniform Securities Act (the Uniform Act), but neither the Uniform Act nor the Maryland Act define "dishonest or unethical practices." The

Division has not adopted any rules or regulations or issued any releases interpreting the phrase. This lack of statutory and administrative definition creates some initial difficulty in determining whether Mrs. Brewster engaged in "dishonest or unethical practices."

This difficulty, however, is not insurmountable. The phrase "dishonest and unethical practices" can, indeed must be read in the context of the ethical standards developed by the NASD, the exchanges and the SEC. The link between the language of the Uniform Act (and hence the Maryland Act) and these ethical standards was first pointed out by Professor Louis Loss, the Draftsman of the Uniform Act, who argued that the term "dishonest and unethical practices" is not "dangerously" vague, "particularly in view of § 15A of the Securities Exchange Act of 1934 . . . under which the NASD has been evolving ethical standards." Draftsman's Commentary to § 204(a)(G), *reprinted in* L. Loss, *Commentary on the Uniform Securities Act* 32 (1976). The ethical standards developed by the NASD, the exchanges and the SEC are widely regarded as a basis for interpreting the phrase "dishonest and unethical practices." See, e.g., Moscow & Makens (eds.), *Michigan Securities Regulation* 82-83 (1983); H. Sowards & N. Hirsch, 11C-Part 2 *Business Organizations-Blue Sky Regulation* 105 (1986). Of particular importance in this regard is a Statement of Policy on Dishonest or Unethical Business Practices adopted by the North American Securities Administrators Association (NASAA) in 1983. See NASAA Reports (CCH) ¶¶ 1401-1404. This Statement of Policy expressly incorporates several aspects of NASD and SEC ethical standards into a detailed defini-

tion of the term "dishonest or unethical business practices."

Among the most important ethical standards are those relating to unsuitable recommendations. Article III, Section 2 of the NASD Rules of Fair Practice, for example, provides that:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

NASD Manual (CCH) ¶ 2152. Similar "suitability" rules have been developed by the New York and American Stock Exchanges for their members (see Rule 405, N.Y. Stock Ex. Guide (CCH) ¶ 2405; Rule 411, Am. Stock Ex. Guide (CCH) ¶ 943) and by the Securities and Exchange Commission (SEC) for SEC-registered broker dealers who were not NASD members (see Rule 15b10-3, [rescinded 1983]). These suitability concepts are gradually being absorbed into state law under the aegis of the "dishonest or unethical practices" language of the Uniform Act and most state statutes.

Several states, for example, have adopted rules expressly defining unsuitable recommendations as a form of "dishonest or unethical practice." See, for example, Ark. Sec. Comm'r's Rule 6.02.B, 1 Blue Sky L. Rep. (CCH) ¶ 10,432 (based on NASD rule); Conn. Agencies Regs. § 36-500-15(a)(i)(bbb), 1 Blue Sky L. Rep. (CCH) ¶ 14,415 (based on former SEC Rule 15b10-3); Wis. Admin. Reg.

§ SEC 4.06(1)(C), 3 Blue Sky L. Rep. (CCH) ¶ 64,566 (based on former SEC Rule 15b10-3).[2] In these states, an unsuitable recommendation under the state rule clearly constitutes a "dishonest or unethical practice" and furnishes a basis for suspension or revocation of a license under the state statute. Definitional rules of this type are desirable, but the lack of such a rule in Maryland does not preclude reference to the NASD Rules of Fair Practice or the other ethical standards for the purpose of determining whether an agent has engaged in "dishonest or unethical practices." This kind of reference is wholly appropriate when such ethical standards are widely applied and well known, and when they have in fact become the normative standards of behavior in the industry.

Reference to these rules is not a backhanded attempt to "engraft" NASD rules onto Maryland law.[3] All that needs to be held is that these ethical standards may be

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2. See also NASAA Statement of Policy, Dishonest or Unethical Business Practices, § 1.c (April 23, 1983), NASAA Reports (CCH) ¶ 1402 (a more stringent version of Rule 15b10-3.)

3. Counsel for Mrs. Brewster has argued that "[i]t is the State's contention that the requirements of [NASD Rules of Fair Practice, Article III, Section 2] . . . should be engrafted onto the term 'unethical practice' as such is used in Section 11-412(a)(7) of the Annotated Code of Maryland . . ., thus allowing a violation of [Section 2] to constitute a violation of the [Maryland] Statute." Reply Memorandum of Respondent Maria Bruehwiler Brewster at 1. This argument gains nothing for the Respondent. First of all, it is a distortion of the Division's position. Secondly, and as stated above, it is not necessary to hold that a violation of the NASD rule automatically constitutes a "dishonest or unethical practice," and the Hearing Officer does not so hold. It is merely held here that the term "dishonest or unethical practices"may be interpreted in light of the suitability rules of the NASD.

used as an interpretive context for determining the meaning of "dishonest or unethical practices" under section 11-412(a)(7) of the Act. The Hearing Officer accordingly so holds, and will refer to these standards as source of guidance for the purpose of determining whether Mrs. Brewster engaged in "dishonest or unethical practices" under section 11-412(a)(7).[4] Particular reference will be made to Article III, Section 2 of the NASD Rules of Fair Practice, since Mrs. Brewster was an NASD-registered broker familiar with that ethical standard.

One of the principal sources of authority for applying the NASD's Rules of Fair Practice are statements of policy of the NASD's Board of Governors. With respect to Article III, Section 2, the Board of Governors has stated that "[r]ecommending speculative low-priced securities to customers without knowledge of or attempt to obtain information concerning the customers' other securities holdings, their financial situation and other necessary data," "clearly violate[s]" the responsibility of member organizations and their registered representatives for fair dealing. According to the Board of Governors, "[t]he

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4. Counsel for Mrs. Brewster has argued, in effect, that "specific guidelines" are necessary before an agent that makes an unsuitable recommendation can be disciplined under section 11-412(a)(7). Counsel apparently regards such guidelines as a constitutional necessity. Reply Memorandum of Respondent Maria Bruehwiler Brewster at 1. Unfortunately, counsel cites no authority for this proposition, and offers no explanation of why the Constitution would require such specific guidelines. In any event, specific guidelines would hardly seem to be either necessary or appropriate, in view of the highly subjective and *ad hoc* character of suitability determinations—a characteristic repeatedly emphasized by Stuart-James and its counsel in the course of the Hearing. See *Tr.* at 218, 246-49 .

principle here is that this practice, by its very nature, involves a high probability that the recommendation will not be suitable for at least some of the persons solicited. This has particular application to high pressure telephonic sales campaigns." NASD Manual (CCH) ¶ 2152, at 2051. This statement of policy provides some insight into the factors relevant to the suitability of this recommendation.

The first factor to consider is the manner in which Mrs. Brewster evaluated and made use of the information available to her about the Lang's investment experience and financial status. Her behavior in this regard leaves much to be desired. First of all, Mr. Lang informed her at the outset that he and his wife had never purchased stock before, and that his wife was not the "gambling type." *Tr.* at 18. This should have dispelled any impression of sophistication or experience Mrs. Brewster might have derived from the existence of the Schwab account. *Id.* at 169. Secondly, Mrs. Brewster made no effort to determine the extent of the Lang's understanding of the risk they were about to take, and it should have been apparent to her that they had a minimal understanding of those risks, even though they were college graduates. Finally, she not only made no effort to determine with specificity the extent of the Lang's relatively low net worth and extremely low liquid assets, she actively encouraged Mr. Lang to misrepresent his net worth. If Mrs. Brewster had met her responsibility of evaluating the suitability of this recommendation in light of the information furnished to her by Mr. Lang (as well as other information that she could have obtained through a few simple ques-

tions), she should have reached the conclusion that this recommendation was only marginally suitable at best. This is not to say that she should absolutely have foregone the opportunity to recommend and sell this stock to the Langs. It does mean, however, that she should have sold this stock to them in an entirely different manner.

The manner of sale is the second crucial factor in evaluating the suitability of a recommendation. Once it is determined that a particular stock is questionably or marginally suitable for a particular investor, the agent has an obligation to deal with the client in a careful and straightforward manner. In particular, the agent must disclose the kind of facts that will make the customer understand the particular risks associated with the investment. Furthermore, the agent must avoid pressuring the client. Mrs. Brewster's actions in this case provide a classic example of how not to sell marginally suitable securities to unsophisticated investors. For example, Mrs. Brewster made no *specific* disclosures whatsoever of the particular risk factors associated with this stock, and contented herself with platitudes about its "risky" or "speculative" character and the need to invest on a portfoilo basis. By her own admission she hardly departed from a very bare-bones script. *Tr.* at 168-69, 159. If Mrs. Brewster wanted to sell this stock to unsophisticated, first-time investors, she should have explained what they were getting into in much greater detail.

She also should have forgone the high pressure telephonic sales tactics upon which she relied. While Mrs. Brewster may not have been operating out of a classic

boiler room of the most egregious sort,[5] she certainly was engaged in an intensive telephonic sales campaign that presented significant opportunities for abuse. Mrs. Brewster was a young broker with less than two months experience, no educational background in finance or business, and two weeks of training of unknown quality, operating in work environment that expected her to dial 300 telephone numbers a day and complete 40 or 50 of these calls. *Tr.* at 158. She was also apparently expected to meet certain production requirements or face termination of her employment. *Id.* at 222. It is not surprising, therefore, that in her dealings with Mr. and Mrs. Lang—persons with whom she had absolutely no prior business or personal relationship—she used high pressure sales techniques that induced the Langs to invest in a hasty and unconsidered manner. The high pressure character of her behavior is evidenced by the repeated phone calls to the Langs in a short time period, her volunteering to call Mrs. Lang and Schwab, her suggestion that the Langs should make a decision by that afternoon in order to obtain the stock at a particular price, and her failure to provide any specific disclosure of the risk factors associated with this investment.

In sum, it must be concluded that Mrs. Brewster made an unsuitable recommendation of the CXR stock to the

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5. For a description of a classic boiler room operation, see *United States v. Ross*, 321 F.2d 61, 64 (2d Cir. 1963), *cert. denied*, 375 U.S. 894. The Division did not attempt to prove that the Stuart-James operation in Columbia fit this description, but Mrs. Brewster's own testimony established that she was engaged in the type of intensive telephonic sales campaign that frequently generates suitability problems. See *Tr.* at 158.

Langs. If she had properly performed her obligation of assessing the information presented to her she should have reached the conclusion that this investment was at best only marginally suitable for these inexperienced investors with a low net worth and few liquid assets. This conclusion would not necessarily have precluded her from recommending and selling the stock to the Langs, but she should have done so only on a fully disclosed basis and without high pressure sales tactics. Her failure to sell the stock in that manner pushed the transaction over the edge and changed it from a marginally unsuitable recommendation to a wholly unsuitable recommendation. By making such a recommendation, Mrs. Brewster engaged in "dishonest and unethical practices" under the Act.

It is not clear, however, that this conclusion requires entry of a final order by the Commissioner suspending Mrs. Brewer's registration. The Commissioner may enter such an order only when she "finds that the order is in the public interest." Section 11-412(a). In order to determine whether such an order is appropriate in this case, certain mitigating factors need to be considered. In particular, Mrs. Brewster's youth and inexperience should be taken into account, as should her lack of a disciplinary record. Stuart-James' prompt cancellation of the trade and the consequent lack of any loss to the Langs are also worth consideration as mitigating factors. Furthermore, the fact that the Langs, while unsophisticated, were not entirely babes-in-the-woods, but rather gainfully employed, relatively well-educated individuals who have gone on to invest in other speculative securities also tends to diminish the culpability of Mrs. Brewster's behavior.

Consideration of these mitigating factors, when viewed as a whole, could perhaps lead to the conclusion that no final order suspending her registration should be entered, and that the matter should be resolved with a modest fine. One fact, however, prevents the Hearing Officer from reaching that conclusion. It was found above that Mrs. Brewster induced Mr. Land to misrepresent his net worth for purposes of the Stuart-James suitability determination.[6] Finding of Fact, paragraph 16; *Tr.* at 20-21, 58, 123. This blatant attempt to manipulate the truth shows that this is not a case of an inexperienced and overeager agent who did not understand or fully appreciate the suitability concept, but rather a case of an agent who willfully and dishonestly chose to disregard her obligations under the law. It is thus entirely in the public interest that Mrs. Brewster's registration be suspended. In view of the mitigating factors listed above, however, her registration should be suspended for a period of 30 days, rather than the 90 days specified in the Order.

---

6. At the Hearing, Mrs. Brewster denied instructing Mr. Lang to "pick a higher number" for his net worth. *Tr.* at 178. Counsel for Mrs. Brewster also tried to establish that Mrs. Brewster would have had no incentive for inducing a misrepresentation of Mr. Lang's net worth. *Id.* at 220, 240-241. In view of the conflict between Mr. Lang's and Mrs. Brewster's statements, the Hearing Officer was forced to choose the most credible testimony. The most telling factor in this choice proved to be the disparity between the Lang's Schwab account application form, State's Ex. #9, and the $50,000 net worth figure used by Stuart-James. What accounts for this disparity? It seems unlikely that it would have even occurred to Mr. Lang, a person who did not understand the rudiments of investing, to overstate his net worth if someone had not suggested to him that he needed to do so. The person with the most to gain from such a suggestion was Mrs. Brewster. On balance, therefore, Mr. Lang's testimony was found to be more credible than Mrs. Brewster's.

III. Recommended Action

In view of these Findings of Fact and Conclusions of Law, the Hearing Officer recommends that the Commissioner enter a final order: (i) suspending the agent registration of Mrs. Brewster for a period of 30 days, as provided by section 11-412(a)(7) of the Act; and (ii) fining Mrs. Brewster in the amount of $100, as provided by section 11-417 of the Act.

As indicated above, Stuart-James terminated Mrs. Brewster's agent registration with the NASD, and hence the state of Maryland, in April of 1986. Findings of Fact, paragraph 35. The timing and circumstances of the suspension recommended above are thus matters for the Commissioner to determine at such time as Mrs. Brewster seeks a new registration in Maryland.

IN THE MATTER OF:	) Administrative) Proceeding
THE STUART-JAMES COMPANY, INCORPORATED	)) Before The)
and	) Securities) Commissioner
MARIA BRUEHWILER	)) Offices Of The) Attorney General,) Maryland Division) Of Securities) Munsey Building) 4th Floor) Calvert and) Fayette Streets) Baltimore,) Maryland 21202

ORDER TO SHOW CAUSE

WHEREAS, The Stuart-James Company, Incorporated ("Stuart-James") is a broker-dealer registered with the Office of the Attorney General, Maryland Division of Securities, as a broker-dealer; and

WHEREAS, Maria Bruehwiler is an agent registered with the Office of the Attorney General, Maryland Division of Securities, and is employed by Stuart-James at its Columbia, Maryland office located at 9841 Broken Land Parkway, Columbia, Maryland 21045; and

WHEREAS, on or about November 12, 1985 Ms. Bruehwiler contacted by telephone Douglas C. Lang, a resident of the State of Maryland, identified herself as an employee of Stuart-James, and described the stock of CXR Telecom Corporation ("CXR Stock") to Mr. Lang, *see*

Affidavit of Douglas C. Lang, ¶¶ 1 & 2 (the "Lang Affidavit"), a copy of which is attached hereto as Exhibit A; and

WHEREAS, during this telephone conversation, Ms. Bruehwiler did not indicate any risk involved in investing in CXR Stock, but merely stated that such stock should be one part of Mr. Lang's portfolio, *see* Lang Affidavit at ¶ 2; and

WHEREAS, Ms. Bruehwiler assured Mr. Lang that she would "get [them] out of the stock" before Mr. and Mrs. Lang lost any money on it, *see* Lang Affidavit at ¶ 3; and

WHEREAS, Ms. Bruehwiler informed Mr. Lang that she would be able to obtain the stock at the price she quoted only if Mr. and Mrs. Lang purchased the stock by the end of that day, *see* Lang Affidavit at ¶ 4; and

WHEREAS, the Langs subsequently purchased the stock from Ms. Bruehwiler on the following day for the same price Ms. Bruehwiler had originally quoted to Mr. Lang, *see* Lang Affidavit at ¶ 4; and

WHEREAS, during her initial telephone conversation with Mr. Lang, Ms. Bruehwiler asked Mr. Lang about Mr. and Mrs. Lang's net worth and Mr. Lang informed her that it was $10,000, the amount stated in the form supplied to Charles Schwab & Co., Inc. ("Schwab") approximately 2 months before, *see* Lang Affidavit at ¶ 5; Schwab "Options Financial Questionaire" form executed by Mr. and Mrs. Lang on September 25, 1985, a copy of which is attached hereto as Exhibit B; and

WHEREAS, Ms. Bruehwiler stated to Mr. Lang "that isn't going to be enough, you'll have to pick a higher number," causing Mr. Lang to supply her with the higher figure of $50,000; and

WHEREAS, when informed by Mr. Lang that he would not be able to decide whether to invest in this stock without discussing it with his wife, Ms. Bruehwiler offered to discuss the purchase with Mr. Lang's wife, *see* Lang Affidavit at ¶ 6; and

WHEREAS, when Mr. Lang asked Ms. Bruehwiler if he and his wife could obtain money from their money market account at Schwab, Ms. Bruehwiler volunteered to call Schwab to find out how the money could be obtained; and

WHEREAS, Mr. Bruehwiler called Mr. Lang again the same day to explain how the Langs could obtain money from their money market account held at Schwab and that the check would be in the mail from Schwab the day after the Langs' request was received; *see* Lang Affidavit at ¶ 7; and

WHEREAS, Ms. Bruehwiler called Mr. Lang on or about November 13, 1984 to tell him that Mrs. Lang had approved the investment, at which time Mr. Lang told Ms. Bruehwiler that she could place the order for the CXR Stock, *see* Lang Affidavit at ¶ 8; and

WHEREAS, the prospectus for CXR Stock, a copy of which is attached hereto as Exhibit C, reveals that the securities of that company offered thereby involved "a high degree of risk including an immediate substantial dilution of the net tangible book value of the common stock from

the initial public offering price," and that prior to the offering, there had "been no market for the company's common stock" and there could be "no assurance" that a market would develop following the offering; and

WHEREAS, Mr. and Mrs. Lang were not aware of the risks disclosed in the prospectus regarding the CXR Stock until the prospectus was received after they purchased the CXR Stock; and

WHEREAS, when Mr. Lang stated to Ms. Bruehwiler that his personal net worth was $10,000, an amount insufficient to permit this trade to be made, according to statements made by agents of Stuart-James during a meeting with the Securities Commissioner on January 6, 1986, Ms. Bruehwiler urged Mr. Lang to provide a higher figure so that a clearly unsuitable trade could be made; and

WHEREAS, recommending to customers the purchase of a low-priced speculative stock that is clearly unsuitable for them in view of their financial position, and encouraging a customer to falsify the amount of his net worth in order to complete such a sale are dishonest and unethical practices prohibited by § 11-412(a)(7) of the Maryland Securities Act, Maryland Corporations and Associations Article, Title 11, Annotated Code of Maryland (1985 Replacement Volume) (the "Act") and also violate § 2 of the Rules of Fair Practice of the National Association of Securities Dealers, Inc.; and

WHEREAS, pursuant to § 11-412(a)(7) of the Act, the Commissioner by order may deny, suspend, or revoke the registration of any agent if he finds that order is in the public interest and that the registrant has engaged in dishonest or unethical practices.

ACCORDINGLY, IT IS HEREBY ORDERED, that the Respondent Maria Bruehwiler appear at the offices of the Attorney General, Securities Division, Munsey Building, 4th Floor, Calvert and Fayette Streets, Baltimore, Maryland 21202 to show cause why an order suspending her registration as an agent for a period of 90 days as provided by § 11-412 of the Act and fining her $100 for this violation of the Act as provided by § 11-417 of the Act should not be entered for engaging in the dishonest and unethical practices described herein.

IT IS FURTHER ORDERED, that pursuant to Rule 02.02.01.03C of the Cody of Maryland Regulations, failure to request in writing a hearing within fifteen (15) days of the receipt of this Order to Show Cause shall be deemed a default and result in the appropriate final order being entered.

DATE OF THIS ORDER:

2/28/86

SO ORDERED:

/s/ Susan Merrick Rittenhouse
Susan Merrick Rittenhouse
Securities Commissioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February, 1986, a copy of the aforegoing Order to Show Cause was served by depositing same with the United States Postal Service, certified mail, return receipt requested, upon:

Maria Bruehwiler
The Stuart-James Company, Incorporated
9841 Broken Land Parkway
Columbia, Maryland 21045
and
The Stuart-James Company, Incorporated
c/o Marc N. Geman
4601 DTC Boulevard, Suite 650
Denver, Colorado 80237

/s/ SARAH MCCAFFERTY
Sarah McCafferty
Assistant Attorney General

"EXHIBIT A"

AFFIDAVIT

Baltimore County)
) ss:
State of Maryland)

DOUGLAS C. LANG, being duly sworn, deposes and says:

1. On approximately November 12, 1985, Maria Bruehwiler called me at my office. She identified herself as an employee of the Stuart-James Company. She informed me that she had received my name from an aquaintance who knew that my wife, Holly Lang, and I had recently put money into a money market at Charles A. Schwab ("Schwab") and were planning to invest in stocks.

2. During this telephone conversation Ms. Bruehwiler described the stock of CXR Telcom Corporation ("CXR stock"). At no time during this conversation did Ms. Bruehwiler indicate there were any risks involved in investing in CXR stock. She merely stated that the CXR stock should be one part of our portfolio.

3. I told Ms. Bruehwiler that this was the first time I had bought stock and that if the investment lost money, my wife would object to further investment in stock. Ms. Bruehwiler assured me that she would "get us out of the stock" before we lost any money.

4. Ms. Bruehwiler also told me that she would be able to obtain the stock at the price quoted only if we purchased the stock by the end of the day. We subsequently decided to purchase the stock on the next day, for the price Ms. Bruehwiler originally quoted to me.

5. During this telephone conversation Ms. Bruehwiler asked about our net worth. I informed her that it was $10,000.00. This is the amount that is stated in the form we supplied to Schwab approximately 3 months before. Ms. Bruehwiler stated that "that isn't going to be enough, you'll have to pick a higher number." I then told her to make the figure $50,000.00.

6. During this telephone conversation I told Ms. Bruehwiler that I would not be able to decide whether to invest in this stock without discussing it with my wife. Ms. Bruehwiler told me that she would discuss the investment with my wife and asked for her telephone number, which I gave her. I also asked her if we could obtain money from our money market account at Schwab and she volunteered to call Schwab to find out the procedure for doing so.

7. Ms. Bruehwiler called me back the same day to tell me how to request money from our Schwab money market account and informed me that the check would be in the mail from Schwab the day after the request was received.

8. Ms. Bruehwiler called me back the next day to tell me that she had discussed the investment with my wife and that my wife had approved the investment. I then told her she could place the order for the CXR stock.

9. Soon after this telephone conversation with Ms. Bruehwiler, on or about November 19 or 20, 1985, I obtained a copy of the prospectus for CXR Telecom Corporation from another person. I was shocked by the fact that the prospectus revealed this investment to be very risky. I then spoke with my brother, Michael Lang, who was formerly employed as a stock broker, who further explained the risks involved in investing in the CXR stock. After reading the prospectus and discussing the situation with my brother, I realized that my wife and I could not afford to take the risks that this investment represented.

FURTHER AFFIANT SAYETH NOT:

/s/ Douglas C. Lang
DOUGLAS C. LANG

SWORN AND SUBSCRIBED BEFORE ME THIS 9th DAY OF DECEMBER, 1985.

/s/ Illegible
Notary Public

MY COMMISSION EXPIRES: 7-1-86

§ 11-412. *Denial, revocation, or suspension of registration.*

(a) *Grounds for denial, suspension, or revocation.*— The Commissioner by order may deny, suspend, or revoke any registration if he finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer:

(1) Has filed an application for registration which as of its effective date or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(2) Has willfully violated or willfully failed to comply with any provisions of this title, a predecessor act, or any rule or order under this title or a predecessor act;

(3) Has been convicted of a felony, infamous crime, or other crime involving moral turpitude;

(4) Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practices involving any aspect of the securities business;

(5) Is the subject of an order of the Commissioner denying, suspending, or revoking registration as a broker-dealer or agent;

(6) Is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer or agent or

the substantial equivalent of those terms as defined in this title, or is suspended or expelled from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934 either by action of a national securities exchange or national securities association, the effect of which action has not been stayed by appeal or otherwise, or by order of the Securities and Exchange Commission, or is the subject of a United States post-office fraud order, but:

(i) The Commissioner may not institute a revocation or suspension proceeding under this item (6) more than one year from the date of the order or action relied on; and

(ii) He may not enter an order under this item (6) on the basis of an order under another state act unless that order was based on facts which would currently constitute a ground for an order under this section;

(7) Has engaged in dishonest or unethical practices.

(8) Is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature, but the Commissioner may not enter an order against a broker-dealer under this item (8) without a finding of insolvency as to the broker-dealer; or

(9) Is not qualified on the basis of factors such as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (d) of this section.

(b) *Additional grounds.*—The Commissioner by order may deny, suspend, or revoke any registration if he finds that the order is in the public interest and that the applicant or registrant:

(1) Has failed reasonably to supervise his agents, if he is a broker-dealer; or

(2) Has failed to pay the proper filing fee, but the Commissioner may enter only a denial order under this item (2), and he shall vacate the order when the deficiency is corrected.

(c) *Limitation on proceedings.*—The Commissioner may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when the registration became effective unless the proceeding is instituted within the next 30 days.

(d) *Lack of qualifications.*—The following provisions govern the application of subsection (a)(9) of this section:

(1) The Commissioner may not enter an order against a broker-dealer on the basis of the lack of qualification of any person other than the broker-dealer himself, if he is an individual, or agent of the broker-dealer;

(2) The Commissioner may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training in or knowledge of securities, or both;

(3) The Commissioner shall consider that an agent who will work under the supervision of a registered broker-dealer need not have the same qualifications as a broker-dealer; and

(4) The Commissioner by rule may provide for an examination, which may be written, oral, or both, to be taken by any class of or all applicants. (An. Code 1957, art. 32A, § 18; 1975, ch. 311, § 2.)

¶ 2152 *Recommendations to Customers*

Sec. 2. In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situations and needs.

• • • *Policy of the Board of Governors*

Fair Dealing With Customers

Implicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on a basis that can be judged as being within the ethical standards of the Association's rules, with particular emphasis on the requirement to deal fairly with the public.

This does not mean that legitimate sales efforts in the securities business are to be discouraged by requirements which do not take into account the variety of circumstances which can enter into the member-customer relationship. It does mean, however, that sales efforts must be judged on the basis of whether they can be reasonably said to represent fair treatment for the persons to whom the sales efforts are directed, rather than on the argument that they result in profits to customers.

District Business Conduct Committees and the Board of Governors have interpreted the Rules of Fair Practice, taken disciplinary action and imposed penalties in many situations where members' sales efforts have exceeded the reasonable grounds of fair dealing.

Some practices that have resulted in disciplinary action and that clearly violate this responsibility for fair dealing are set forth below, as a guide to members:

Recommending Speculative Low-priced Securities

1. Recommending speculative low-priced securities to customers without knowledge of or attempt to obtain information concerning the customers' other securities holdings, their financial situation and other necessary data. The principle here is that this practice, by its very nature, involves a high probability that the recommendation will not be suitable for at least some of the persons solicited. This has particular application to high pressure telephonic sales campaigns.

Excessive Trading Activity

2. Excessive activity in a customer's account, often referred to as "churning" or "overtrading." There are no specific standards to measure excessiveness of activity in customer accounts because this must be related to the objectives and financial situation of the customer involved.

Trading in Mutual Fund Shares

3. Trading in mutual fund shares, particularly on a short-term basis. It is clear that normally these securities are not proper trading vehicles and such activity on its face may raise the question of rule violation.

Fraudulent Activity

4. Numerous instances of fraudulent conduct have been acted upon by the Association and have resulted in penalties against members. Among some of these activities are:

Fictitious Accounts

(a) Establishment of fictitious accounts in order to execute transactions which otherwise would be prohibited, such as the purchase of hot issues, or to disguise transactions which are against firm policy.

Discretionary Accounts

(b) Transactions in discretionary accounts in excess of or without actual authority from customers.

Unauthorized Transactions

(c) Causing the execution of transactions which are unauthorized by customers or the sending of confirmations in order to cause customers to accept transactions not actually agreed upon.

Misuse of Customers' Funds or Securities

(d) Unauthorized use or borrowing of customers' funds or securities.

In addition, other fraudulent activities, such as forgery, non-disclosure or misstatement of material facts, manipulations and various deceptions, have been found in violation of Association rules. These same activities are also subject to the civil and criminal laws and sanctions of Federal and State Governments.

Recommending Purchases Beyond Customer Capability

5. Recommending the purchase of securities or the continuing purchase of securities in amounts which are inconsistent with the reasonable expectation that the customer has the financial ability to meet such a commitment.

While most members are fully aware of the fairness required in dealing with customers, it is anticipated that

these enumerated practices, which are not all inclusive, will be of future assistance in the training and education of new personnel.

The Securities and Exchange Commission has also recognized that brokers and dealers have an obligation of fair dealing in actions under the general anti-fraud provisions of the Federal securities laws. The Commission bases this obligation on the principle that when a securities dealer open his business he is, in effect, representing that he will deal fairly with the public. Certain of the Commission's cases on fair dealing involve practices not covered in the foregoing illustrations. Usually, any breach of the obligation of fair dealing as determined by the Commission under the anti-fraud provisions of the securities laws could be considered a violation of the Association's Rules of Fair Practice.

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

MARIA BRUEHWILER BREWSTER,	)	No. 407
vs.	)	September Term, 1988
MARYLAND SECURITIES COMMISSIONER	)	

NOTICE OF INTENT TO FILE A PETITION FOR WRIT OF CERTIORARI WITH THE SUPREME COURT OF THE UNITED STATES

Petitioner Maria Bruehwiler Brewster, through undersigned counsel, herewith gives notice that she will file a Petition for Writ of Certiorari with the Supreme Court of the United States to review this Court's order of January 11, 1989.

DATED this 29th day of March, 1989.

HART & TRINEN

/s/ CHRISTA D. TAYLOR
DONALD T. TRINEN
CHRISTA D. TAYLOR
MARK M. MARAIA
1624 Washington Street
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ROSEN & DE MARTINO
JEFFREY S. ROSEN
1818 N Street, N.W.
Suite 400
Washington, DC 20036

Attorneys for Petitioner
MARIA BRUEHWILER BREWSTER

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of March, 1989, a true and correct copy of the foregoing NOTICE OF INTENT TO FILE A PETITION FOR WRIT OF CERTIORARI WITH THE SUPREME COURT OF THE UNITED STATES was deposited in the United States mail, postage prepaid and properly addressed to:

SARAH MCCAFFERTY, ESQ.
Assistant Attorney General
Office of the Attorney General
Division of Securities
Munsey Building
Calvert & Fayette Streets
Baltimore, MD 21202-1918

/s/ KATHY SWEENEY

Supreme Court, U.S.
FILED
MAY 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1665

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARIA BRUEHWILER BREWSTER,
Petitioner,

v.

MARYLAND SECURITIES COMMISSIONER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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20 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the determination of the Maryland Court of Special Appeals that Petitioner, a broker-dealer agent registered with both the State of Maryland and the National Association of Securities Dealers, Inc. (the "NASD"), engaged in a dishonest or unethical practice in violation of the Maryland Securities Act when she engaged in conduct clearly prohibited by an NASD rule violated Petitioner's right to due process.

2. Whether Petitioner timely raised a claim under the first amendment and, if so, whether the Court of Special Appeals properly held her speech was not protected by the first amendment because it was misleading.

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No. 88-1665

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

MARIA BRUEHWILER BREWSTER,

Petitioner,

v.

MARYLAND SECURITIES COMMISSIONER,

Respondent.

ON PETITION FOR WRIT
OF CERTIORARI TO THE COURT
OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

On February 28, 1986, the Maryland Securities Commissioner [hereinafter the "Commissioner"] issued an Order to Show

Cause [hereinafter the "Order"] to the Petitioner, Maria Bruehwiler Brewster, who was at that time an agent registered with the Maryland Division of Securities and the National Association of Securities Dealers, Inc. [hereinafter the "NASD"], and employed by The Stuart-James Company, Inc., a Maryland-registered broker-dealer, at its Columbia, Maryland office.

The action was instituted after Petitioner sold shares of a speculative stock in a company called CXR Telecom to a Maryland couple, Mr. and Mrs. Lang. See Findings of Fact of Hearing Officer (Apx. 36). The administrative record, including the Hearing Officer's undisputed Findings of Fact, shows that:

> [W]hile advocating CXR to Lang, Brewster failed to indicate 'any specific or detailed information . . . about the particular risk factors associated with CXR.' The record further clearly demonstrates that,

> because of Lang's then relatively minuscule financial net worth, Brewster induced him to inflate five fold his net worth in order to facilitate the approval of the trade by Stuart-James, Brewster's employer.

Brewster v. Maryland Securities Comm'r, 76 Md. App. 722, 724-25, 548 A.2d 157, 158 (1988), cert. denied, 314 Md. 496, 551 A.2d 867 (1989) (Apx. 3) (quoting Hearing Officer's Findings of Facts) (footnote omitted).

The Order specifically stated that:

> [R]ecommending to customers the purchase of a low-priced speculative stock that is clearly unsuitable for them in view of their financial position, and encouraging a customer to falsify the amount of his net worth in order to complete such a sale are dishonest and unethical practices prohibited by §11-412(a)(7) of the Maryland Securities Act, . . . and also violate §2 of the Rules of Fair Practice of the National Association of Securities Dealers, Inc.

Order to Show Cause (Apx. 59).

The Commissioner's final order fined Petitioner $100 and suspended her

agent registration for 30 days. 76 Md. App. at 724, 548 A.2d at 158 (Apx. 18). Petitioner has stated in her petition that "she is not challenging the Maryland Court's findings that her suggestion to the customer to inflate his net worth merited sanctions." Petition for Writ of Certiorari at 5.

REASONS FOR DENYING THE WRIT

SUMMARY

Further review of this case is plainly unwarranted. The Petition fails to present a substantial federal question or any novel or unsettled questions on which the federal or state courts require the guidance of this Court. The decision of the Court of Special Appeals of Maryland (hereinafter the "Court of Special Appeals") is consistent with prior decisions of this

and other courts. No sound reason exists for disturbing the well-reasoned decision of the Court of Special Appeals.

I. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE PETITION.

Petitioner has raised two questions for review: 1) whether on the facts of this case, the application of §11-412(a)(7) of the Maryland Securities Act violated Petitioner's due process rights and 2) whether Petitioner's first amendment rights were violated. The Court of Special Appeals properly applied existing Supreme Court precedent to these issues and correctly rejected both arguments. Because the questions themselves present no important question of federal law and were properly decided by the state court, the Petition should be denied.

A. Application of §11-412(a)(7) of the Maryland Securities Act Did Not Violate Petitioner's Due Process Rights.

Petitioner claims that because the term "unsuitable" in the Commissioner's Order was not defined to her satisfaction, the application of §11-412(a)(7) of the Maryland Securities Act to her conduct violates her due process rights under the fourteenth amendment to the United States Constitution. This argument was properly rejected by the administrative agency charged with enforcement of this technical registration provision, as well as by the Circuit Court for Baltimore City and the Court of Special Appeals. It is without merit and need not be considered again.

Article III, §2 of the Rules of Fair Practice of the NASD provides:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and to his financial situation and needs.

Article III, §2 (Apx. 67), quoted in Brewster v. Maryland Securities Comm'r, 76 Md. App. at 726-27, 548 A.2d at 159 (Apx. 6). This NASD rule is a well-known restatement of the suitability rule, a basic concept in the securities industry.

There are many administrative and judicial decisions addressing the issue of "suitability," as both the Hearing Officer and the final decision maker concluded. See, e.g., Erdos v. Securities and Exchange Comm'n, 742 F.2d 507, 508 (9th Cir. 1984); In re Boren &

Co., 40 S.E.C. 217 (1960); In re Philips & Co., 37 S.E.C. 66 (1956). Moreover, as an agent registered with the NASD, Petitioner knew or certainly should have known of the NASD suitability rule that governs the broker-dealer industry, "having passed a test concerning [the NASD] rules." Brewster, 76 Md. App. at 727, 548 A.2d at 160; see id. at 728, 548 A.2d at 160 (Apx. 7; see Apx. 7-8). The Court of Special Appeals noted that it was "beyond question but that Brewster read the Compliance Manual of her employer, Stuart-James," which twice reprints Article III, §2 of the NASD Rules of Fair Practice and also includes a specific discussion of each agent's responsibility for fair dealing with customers and others. Id. at 726, 548 A.2d at 159 (Apx. 5-6). There can be no

serious question that Petitioner was well aware of the suitability concept.

The administrative agency and both reviewing courts properly followed existing Supreme Court precedent that a broad statutory standard, such as that found in §11-412(a)(7) of the Maryland Securities Act, "is not vague if it has a meaningful referent in business practice, custom, or usage." See, e.g., id. at 728, 548 A.2d at 160 (quoting United States v. Nat'l Dairy Products Corp., 372 U.S. 29 (1963)) (Apx. 8). Each determined that the term "dishonest and unethical" has such a meaningful referent in business practices and usage, embodied in both the NASD's Article III, §2 and Petitioner's employer's own Compliance Manual. See id. at 729, 548 A.2d at 160 (Apx. 8).

At each level of review, Petitioner's due process claim has been carefully considered and properly rejected under existing Supreme Court case law.

B. Petitioner's First Amendment Rights Were Not Violated.

Petitioner's first amendment argument is patently frivolous and has been considered and rejected by both the Circuit Court for Baltimore City and the Court of Special Appeals based upon this Court's ruling in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980).[1] The

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[1] Petitioner's first amendment argument was raised for the first time during appeal to the Circuit Court for Baltimore City after briefing to that court, during oral argument. Therefore, Respondent maintains, and has maintained both at the Circuit Court level and before the Court of Special Appeals, that Petitioner's first amendment argument was waived and should not be entertained on appeal or petition for (Continued)

courts below properly ruled that Petitioner's speech did not meet even the first prong of this Court's test in Central Hudson -- that the commercial speech concern lawful activity and not be misleading. As the Court of Special Appeals pointed out, Petitioner's statement to the Maryland resident in question "with respect to the purchase of CXR stock and the inherent risk factors involved were, at least, misleading." Id. at 731, 548 A.2d at 161 (Apx. 11). Thus, the Court of Special Appeals properly concluded, as had the circuit court below, that Petitioner's statements were not protected by the first amendment. Id., 548 A.2d at 161 (Apx. 11).

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review. See Maryland State Retirement and Pension Systems v. Martin, 75 Md. App. 240, 248, 540 A.2d 1188, 1191 (1988); Chertkof v. Department of Natural Resources, 43 Md. App. 10, 15-18, 402 A.2d 1315, 1318-20 (1979).

II. THE DECISION OF THE COURT OF SPECIAL APPEALS IS CONSISTENT WITH PRIOR DECISIONS OF THIS AND OTHER COURTS.

Both issues raised in the Petition were decided by the Court of Special Appeals in accordance with the decisions of this Court. The Petition does not demonstrate that this decision is contrary to the applicable decisions of this Court or decisions from other courts on similar issues. Although Petitioner claims that the Court of Special Appeals should have applied this Court's decision in United States v. L. Cohen Groceries Co., 255 U.S. 81 (1921), rather than the Court's more recent decision in United States v. National Dairy Products Corp., 372 U.S. 29 (1963), to her due process claim, in fact the test in both these decisions is the same.

In both Cohen and National Dairy Products this Court considered whether the statutory provision in question was so vague that it violated the due process requirement of the fifth amendment. National Dairy Products, 372 U.S. at 31; see Cohen, 255 U.S. at 89. This Court in National Dairy Products, like the Court of Special Appeals below, found that the provision in question did give the necessary notice, and expressly distinguished Cohen, noting that the standard held too vague in that case "was without a meaningful referent in business practice or usage." 372 U.S. at 36. "'There was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . .'" Id. (quoting A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 240-41

(1925)). In contrast, in this case, as in National Dairy Products, id., there is a meaningful and well-known standard applicable to Petitioner's actions as a registered agent in this highly regulated industry. Thus, Petitioner's argument is incorrect.

Conclusion

Respondent respectfully urges the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 1989, three copies of Respondent's Brief in Opposition were sent by first class mail, postage prepaid, to Donald T. Trinen, Esquire, Christa D. Taylor, Esquire, Hart & Trinen, 1624 Washington Street, Denver, Co. 80203, Counsel for Petitioner.

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